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No. CAPITAL CASE

In The

Supreme Court of the United States

KEVIN KEITH,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Third District

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

When a death-sentenced defendant discovers withheld evidence of his innocence, does a state court act contrary to this Court's decisions when it denies relief by relying on the sufficiency of the evidence presented at trial?

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PETITION FOR A WRIT OF CERTIORARI

Kevin Keith respectfully petitions for a writ of certiorari to review the judgment of the Ohio Court of Appeals.

OPINIONS BELOW

The decision of the Supreme Court of Ohio is reported at 917 N.E.2d 811 and is reproduced in the Appendix at 33a. The opinion of the state court of appeals is reported at 2008 Ohio App. LEXIS 5176 and is reproduced in the Appendix at 1a. The opinion of the trial court is reproduced in the Appendix at 18a.

JURISDICTION

The Supreme Court of Ohio declined jurisdiction on December 2, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Fourteenth Amendment, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

B. Eighth Amendment, which provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Thirteen years after Kevin Keith was convicted and sentenced to death, he discovered that a convicted murderer, Rodney Melton, had told an informant of his own plans to carry out the shootings in this case. Keith also discovered that the prosecution witness who resolved the disputed question of the killer's identity—shifting suspicion from Melton to Keith—does not actually exist. The Ohio courts relied on the sufficiency of the evidence at Keith's trial to deny his request for relief. Keith is scheduled to be executed on September 15, 2010.

1. The Crime

The truth of this crime begins with Rodney Melton's plan to punish Rudel Chatman for "snitching" about drug activity. In January 1994, Ohio police were investigating drug trafficking near Crestline, Ohio. Chatman was a police informant who led them to conduct a drug raid on January 21, 1994. Nine people were arrested.

Ten days later, Melton (a convicted murderer), stated his plan to exact revenge on Chatman for his "snitching." Melton told a confidential informant that he "had been paid $15,000 to cripple 'the man' who was responsible for the raids in Crestline, Ohio last week."

Ohio Board of Pharmacy Report, p. 11. And Melton's accomplice in a pharmacy burglary ring would later confirm to police that Melton was paid to kill Chatman.

Two weeks later, on the evening of February 13, 1994, a man with a mask over his mouth and nose (a type of mask that Melton was known to wear) entered an apartment where members of Chatman's family had gathered. This gunman then ruthlessly shot all six people inside. Three were killed: Marichell Chatman; her five-year-old daughter, Marchae; and Marichell's aunt, Linda Chatman. The other three victims survived: Richard Warren, Marichell's boyfriend; and Marichell's young cousins, Quanita and Quinton Reeves. Nancy Smathers, who lived nearby, saw a man run to light-colored car, get stuck in a snow bank, and then drive away.

Police arrived at the scene and committed themselves to the belief that Kevin Keith, who was one of the nine people arrested in the original drug raid, was the shooter. One of the officers specifically brought up Keith's name.

Melton also showed up at the scene after police arrived, and he made sure to tell the officers that his car—a car that matched the physical description given by witness Nancy Smathers—was broken down that night. Oddly, Melton also knew what type of bullets were involved in the killings.

Despite the officers' interest in Keith, the surviving adult, Richard Warren, told no less than four different witnesses—including a police officer—that he did not know who shot him.

The next day, however, the police provided Warren with a name array of four "Kevins." Not surprisingly, Warren chose one of the "Kevins" from the list (Kevin Keith). And despite Warren's statements at the scene that he couldn't see the shooter's face because his face was masked, the police presented Warren with a photo lineup. Picture number five, Keith's photograph, was a much closer-up image than the rest of the images. Warren picked Keith's face out of this lineup. Keith was then arrested.

Suggestions that police had the wrong man continued. Three days after Keith's arrest, seven-year-old Quanita Reeves told the police that she was shot by her "daddy's friend, Bruce." She also excluded the picture of Kevin Keith as the culprit. But young Quanita easily could have mixed up "Bruce" with his brother, Rodney Melton, who was also her "daddy's friend."

Yet the police and prosecution remained focused on Keith, and they put him on trial for the shootings. They kept the jury in the dark about the most damning evidence pointing to Melton.

2. Keith's Trial

Trial turned on one question: Who did it? The prosecution had to overcome some big obstacles to prove it was Keith. The gunman's face was covered, and the surviving witnesses could not identify him at the scene. Indeed, as noted, Quanita specifically excluded Keith as a suspect. Moreover, some facts that the jury heard pointed to Melton. But the prosecution would overcome these weaknesses in disturbing ways.

The jury never knew the following: that Rodney Melton told an informant just two weeks before the murders "that he had been paid $15,000 to cripple 'the man' [Chatman] who was responsible for the raids in Crestline, Ohio last week"; that Melton's accomplice in the burglary ring told police that Melton was paid to kill Chatman; nor that Melton was known to mask his face just as the shooter did. This information was withheld by the State.

With what information the defense knew at the time, there were reasons for the jury to at least consider Melton as the killer. For example, defense counsel had been contacted by one of Melton's relatives, who told him that Melton was "in on the killings." Also, a police officer testified that Melton showed up at the crime scene and knew the type of bullets involved in the killings. The jury also learned that Melton made efforts to tell the police that his car was broken down that night. And the jury heard about Quanita's statement that she was shot by her "daddy's friend, Bruce."

The jury further learned that Melton went to the hospital where Chatman was waiting to hear the status of his surviving relatives, and Melton told Chatman that the murders happened because of his snitching. Thus, the jury had some reason to believe that Melton, not Keith, shot Chatman's relatives, even though more-compelling evidence of Melton's guilt was kept from the jury.

Moreover, the prosecution's efforts to pin the murder on Keith faced a severe weakness: the police efforts to have Keith pointed out in the "all-Kevin"

name array and suggestive photo lineup would do little to credibly shift suspicion from Melton.

Keith moved the trial court to suppress the identification, due to the improper suggestion tactics used by the police to obtain it. But when the trial court denied Keith's motion to suppress, Keith called the police captain in his case-in-chief to let the jurors see for themselves what led to Warren identifying Keith.

One witness would ultimately shore up these obvious problems in the prosecution's case, changing the jury's focus from Melton to Keith. That witness was Nurse Amy Gimmets: the unbiased observer who tended to Richard Warren as he fought for his life at the hospital. According to the prosecution, Nurse Gimmets called the police on Warren's behalf and told the police captain about Warren's recollection of the name "Kevin."

The prosecution used this statement to rebut the assertion that the police improperly provided Warren with the name "Kevin." The police captain explained to the jury that it was only in response to Nurse Gimmets' crucial information that the police provided Warren the "all-Kevin" name array. Thus, with the nurse's unbiased account, the jury was able to resolve whatever doubts it harbored about the identity of the shooter. It must have been Keith.

Because Keith did not possess the damaging statements of Melton's guilt, the prosecution was able to characterize Melton's threats to Chatman as a friendly warning:

Q: (by Prosecutor) Isn't it true you warned Rudel to watch his back prior to these killings?

A: (by Rodney Melton) Yeah.

Q: You were concerned about his suspicious activity as an informant?

A: Yes, sir.

Q: Did you warn him that you were going to do him harm?

A: No, sir.

Tr. pg. 763.

The jury then convicted Keith and sentenced him to death for these horrific crimes. The jury never knew that Nurse Amy Gimmets didn't even exist. It never knew that the real nurse would have testified that Keith was not named as the shooter. It never knew that Melton was paid to kill Chatman. And it never knew that Melton was known to mask his face just as the shooter did. These facts—known to the prosecution and discussed in more detail below—were discovered years later.

3. Counsel Learns of Withheld Exculpatory Evidence.

Thirteen years after Keith's conviction, Keith's attorneys discovered that no person by the name "Amy Gimmets" has ever been employed by the hospital that treated Warren. In fact, Warren's actual attending nurse—Nurse Amy Whisman, who is listed as the

attending nurse on Warren's medical records *and in the testifying officer's police report*—disproves the claim by police that Warren independently supplied the name "Kevin." Nurse Whisman (now Petryk) swore in her affidavit: "I did not ask Richard Warren for the name of the person who shot him, and Richard Warren never told me the name." Petryk Affidavit. Nurse Whisman stated that she called the police to let them know that the victim had awoken but she did not give the police a name for the shooter. *Id.*

Keith's attorneys also discovered what the police already knew: Rodney Melton—the convicted murderer—likely committed this crime. Counsel obtained this information from the files of the Ohio Pharmacy Board, which was investigating Melton in an elaborate ring of burglaries at the time of the shootings. It was in those documents that counsel discovered the following facts that were never disclosed to Keith's jury:

- Two weeks before the shootings, Melton told a confidential informant "that he had been paid $15,000 to cripple 'the man' who was responsible for the raids in Crestline, Ohio last week."

- It was Melton's habit to wear the type of mask that covered his mouth and nose (in order to hide the distinguishing gap between his teeth), just as the shooter did.

- After Keith was arrested for the murders, Melton's accomplice in the pharmacy burglary ring told the police that Melton was paid to kill Chatman.

4. Ohio Courts Deny Relief, Relying on The Sufficiency of Evidence Presented at Trial.

On August 1, 2007, Keith filed a motion in the Ohio trial court for a new trial based on this withheld evidence, under Ohio Criminal Rule 33(A)(6). Keith's motion included two distinct federal claims: (1) the withheld evidence about Melton violated *Brady v. Maryland*, 373 U.S. 83 (1963), and (2) the false testimony about Nurse Gimmets violated *Napue v. Illinois*, 360 U.S. 264 (1959). On July 2, 2008, the trial court denied Keith's request.

On December 1, 2008, the state court of appeals affirmed, concluding that Keith was at fault for not having discovered and raised the evidence earlier. It also recited the *Brady* standard for assessing materiality of withheld evidence, but then concluded that relief was unwarranted because of the sufficiency of evidence presented at Keith's trial. The Ohio Supreme Court denied jurisdiction on December 2, 2009, because Keith's case did not involve a "substantial constitutional question."

REASONS FOR GRANTING THE WRIT

This Court has repeatedly admonished that it is improper to rely on the sufficiency of evidence at trial when assessing whether evidence discovered after the trial requires reversal. Rather, a reviewing court must assess whether the new evidence is material. For *Brady* claims (newly discovered evidence withheld by the prosecution), the court must reverse when there is a "reasonable probability that the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). For *Napue* claims (where the withheld *Brady* evidence is false testimony), the required showing of materiality is even lower: a reviewing court must assess whether there is "any reasonable likelihood" that the false testimony affected the verdict. *Giglio v. United States*, 405 U.S. 150, 154 (1972). As this Court explained in *Kyles*, "none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone." *Kyles*, 514 U.S. at 435, fn. 8.

But when rejecting Keith's claims regarding withheld *Brady* evidence (e.g., that Melton was paid to kill Chatman) and known false testimony (i.e., that Nurse Gimmets is a real person), the Ohio Court of Appeals relied on the prohibited sufficiency analysis: "[A] jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." *Ohio v. Keith*, 2008 Ohio 6187, ¶34 (Ohio Ct. App., Crawford County Dec. 1, 2008); Pet. App. 16a.

This Court's "principal responsibility" and "primary basis" for reviewing state-court decisions "is to ensure

the integrity and uniformity of federal law." *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring). The Ohio courts' disregard of federal law here not only violates this uniformity but is setting up the execution of a likely-innocent man.

I. The Ohio Court's Sufficiency Analysis Conflicts with *Kyles v. Whitley* and *Giglio v. United States*.

A. The Sufficiency Analysis for the *Brady* Claims Conflicts with *Kyles v. Whitley*.

In *Kyles*, this Court held that the test for materiality under *Brady v. Maryland* "is not a sufficiency of evidence test." *Kyles*, 514 U.S. at 434. Rather, the question is whether there is a reasonable probability that the withheld evidence would have led to a different result at trial. *Id.*

This Court faced that issue directly in *Strickler v. Greene*, 527 U.S. 263 (1999), where the lower court used a sufficiency-of-the-evidence standard. The court below recited the proper materiality test, but relied on the following reasoning to reject a *Brady* claim: "[T]he record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty." *Id.* at 290. This Court held that it was improper to use this sufficiency standard. *Id.* at 291.

The Ohio Court of Appeals employed the same faulty analysis here. When reviewing Keith's *Brady* claim, the court recited the proper standard, but also relied on the conclusion that that the new evidence

was not material because "a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." *Keith*, 2008 Ohio 6187, ¶34; Pet. App. 16a.

The proper materiality analysis under *Kyles* would reveal that a new trial is required. As noted, the jury had some reasons to consider Melton as the killer, including his odd behavior at the crime scene and Quanita's identification of "Bruce," Melton's brother. But nothing at trial definitively suggested that he was the culprit. The new evidence contained in the Pharmacy Board reports would have done just that. Melton's statements that he was paid to kill Chatman would, in themselves, have changed the trial. And had the jury known that he masked his face in the same way as the shooter, the jury would have been able to put two and two together.

This evidence would have taken on particular meaning because Keith had an alibi supported by the trial testimony of two witnesses. Further, there was no forensic evidence conclusively linking Keith to the killings. And as the State's experts admitted at trial, because of the small area in which the victims were shot, the shooter likely would have had blood spatter on him. The experts testified that none of the forensic evidence collected linked Keith—or anything in his home—to the crime.

The withheld evidence about Melton creates a "reasonable probability" that the trial would have come out differently under *Kyles*. Had the Ohio court not tainted its analysis by looking to the sufficiency of the evidence at trial, it would have reached this

conclusion. Regardless, as discussed below, there can be no doubt that the outcome would have been different had the jury known that a key prosecution witness—Nurse Amy Gimmets—never existed.

B. The Sufficiency Analysis For the False-Testimony Claim Conflicts with *Giglio v. United States*.

The knowing use of perjured testimony is a *Brady* problem that is in a category of its own. "When the Court has been faced with a claim by a defendant concerning prosecutorial use of such evidence, it has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Nix v. Whiteside*, 475 U.S. 157, 185 (1986) (internal quotation marks omitted). This Court has established that a new trial is required if "the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154. The required showing of materiality is lower than a typical *Brady* claim because "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair." *United States v. Agurs*, 427 U.S. 97, 103 (1976).

Keith explicitly raised this claim in the Ohio courts. The Ohio Court of Appeals acknowledged as much: "Keith argue[d] that Captain Stanley must have lied when he testified that Gimmets told him that the victim stated 'Kevin' was the assailant." *Keith*, 2008 Ohio 6187, ¶30; Pet. App. 15a. It further accepted Keith's facts showing that the testimony regarding Nurse Gimmets was false: "[T]he fact that no 'Amy

Gimmets' worked at the hospital could have been discovered during that time." *Id.* The court then acknowledged that the actual nurse would have contradicted Stanley's testimony about their conversation, as it stated that "the nurse's identity could have been discovered during the course of the trial and used as impeachment." *Id.*

Yet the Ohio court improperly lumped this *Napue* false-testimony claim together with Keith's *Brady* claim. By doing so, the Ohio court relied on the same forbidden sufficiency analysis to dispose of this claim as well.

Relying on the sufficiency analysis is even worse in this context of false testimony, where the materiality standard is lower. And in Keith's case, it is a matter of life and death: Nurse "Amy Gimmets" shored up a fragile prosecution case that would have otherwise left the jury (properly) focused on Melton as the murderer. As the unbiased observer in this case, she relayed, through police testimony, the answer to the question at the heart of the case: The shooter must have been Keith. But the jury never knew that she didn't exist, and they certainly didn't know that the real nurse would have testified that Keith was never named as the shooter. The Ohio court should have simply asked whether this false testimony "could in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154. Had this proper question been asked, the obvious answer would have stood out: Of course it affected the jury—it changed the entire case.

II. No State Grounds Bar These Claims.

Before reaching the merits, the state court of appeals erroneously concluded that Keith's *Brady* and *Napue* claims were procedurally barred. The court stated that Keith should have discovered and raised these claims earlier. Pet. App. 14a-15a. That conclusion ignores this Court's jurisprudence.

It is not Keith's responsibility to seek out and present the evidence that the State suppressed from him. "A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Keith discovered the *Brady* evidence in the notes of the investigators who had been building a case against the Meltons for their pharmacy burglary ring. Before the Meltons' convictions were final, Keith could not have obtained the notes of the investigators. *See Ohio ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 94 (Ohio 1994) ("[I]nformation assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in O.R.C. § 149.43(A)(2)(c), excepted from required release as said information is compiled in anticipation of litigation."). Moreover, Keith's counsel certainly had no access to the confidential informants who collected evidence against the Meltons, as their identities had not even been disclosed yet.

Additionally, defense counsel properly assumed that knowingly false testimony was not being presented in reference to the non-existent Nurse Amy Gimmets: "[I]t was appropriate for [Keith] to assume

that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Banks*, 540 U.S. at 694. "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997).

In sum, there is no adequate state ground to bar Keith's federal claims under *Brady* and *Napue*. The question for this Court is whether the Ohio courts rejected those claims in a way that contradicts federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2010

APPENDIX

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Appendix A: Opinion of the Court of Appeals Third Appellate District Crawford County Ohio, dated December 1, 2008 . . . . . 1a

Appendix B: Opinion and Judgment Entry Denying Defendant Kevin Keith's Motion for Leave to File a Delayed Motion for New Trial and Opinion and Judgment Entry Denying Defendant Kevin Keith's Motion for Leave to Conduct Discovery and Denying Motion for New Trial and Denying Any and All Ancillary Motions, Court of Common Pleas Crawford County, Ohio, dated July 1, 2008 . . . . . 18a

Appendix C: Entry of Supreme Court of Ohio, dated December 2, 2009 . . . . . 33a

APPENDIX A

COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY

CASE NUMBER 3-08-15

[Decided December 1, 2008]

STATE OF OHIO,	)
	)
PLAINTIFF-APPELLEE,	)
	)
V.	)
	)
KEVIN KEITH,	)
	)
DEFENDANT-APPELLANT.	)
	)

Appeal from Common Pleas Court.

Rachel Troutman, Assistant State Public Defender, Tyson Fleming, Columbus, OH, for appellant.

Clifford J. Murphy, Assistant Prosecuting Attorney, Bucyrus, OH, for appellee.

OPINION

PRESTON, J.

{¶ 1} Defendant-appellant, Kevin Keith (hereinafter "Keith"), appeals the Crawford County Court of Common Pleas judgment denying his motion to file a delayed motion for new trial and Crim.R. 33(A)(6) motion for a new trial. For the reasons that follow, we affirm.

{¶ 2} The relevant procedural history and facts of this case were set forth in this Court's prior opinion, *State v. Keith*, 176 Ohio App.3d 260, 2008-Ohio-741, 891 N.E.2d 1191 as follows:[1]

{¶ 3} In February 1994, the Crawford County Grand Jury indicted Keith on three counts of aggravated murder in violation of R.C. 2929.02, with capital-offense specifications, and on three counts of attempted aggravated murder in violation of R.C. 2903.01 and 2923.02, felonies of the first degree. The indictment arose from an incident during which Marichell D. Chatman, her seven-year-old daughter, Marchae D. Chatman, her cousins, Quanita M. Reeves and Quinton M. Reeves, her aunt, Linda Chatman, and Richard Warren were shot in Marichell's apartment. Marichell, Marchae, and Linda died as a result of the shooting, and Quanita, Quinton, and Richard were seriously injured.

{¶ 4} In March 1994, Keith entered a plea of not guilty to all counts in the indictment. In May 1994, Keith filed a notice of alibi. Additionally, the case

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[1] The Court notes that the recitation of facts and procedure was taken word-for-word from our prior referenced opinion, with the exception that additional facts and procedure were added as necessary for this opinion.

proceeded to a jury trial, at which the jury convicted Keith on all six counts of the indictment as charged and recommended the death penalty for the aggravated murder convictions.

{¶ 5} In June 1994, the trial court sentenced Keith to death on the aggravated murder convictions and to a 7- to 25-year prison term on each of the attempted-aggravated-murder convictions, to be served consecutively. Subsequently, Keith appealed his conviction and sentence.

{¶ 6} In April 1996, this court affirmed Keith's conviction and sentence, *State v. Keith* (Apr. 5, 1996), 3d Dist. No. 3-94-14, 1996 WL 156710, and also issued a separate opinion regarding Keith's death sentence in conformity with R.C. 2929.05(A). *State v. Keith* (1996), 3d Dist. No. 3-94-14, 1996 WL 156716. Subsequently, Keith appealed to the Supreme Court of Ohio.

{¶ 7} In September 1996, while his direct appeal was pending, Keith filed his first petition for postconviction relief in the trial court, alleging that he had been denied effective assistance of counsel and attaching numerous exhibits that were not part of the trial record.

{¶ 8} In December 1996, Keith filed a supplemental petition for postconviction relief, in which he alleged ineffective assistance of counsel and requested an evidentiary hearing.

{¶ 9} In October 1997, the Supreme Court of Ohio unanimously affirmed Keith's conviction. *State v. Keith* (1997), 79 Ohio St.3d 514, 684 N.E.2d 47, reconsideration denied (1997), 80 Ohio St.3d 1450, 686

N.E.2d 276, certiorari denied (1998), 523 U.S. 1063, 118 S.Ct. 1393, 140 L.Ed.2d 652.

{¶ 10} In February 1998, the trial court denied Keith's first petition for postconviction relief, without granting an evidentiary hearing, in a 16-page opinion in which it addressed all of his arguments, as well as each of his attached exhibits, and concluded that his petition lacked merit.

{¶ 11} In March 1998, Keith appealed the trial court's denial of his first petition for postconviction relief.

{¶ 12} In August 1998, this court affirmed the trial court's denial of Keith's first petition for postconviction relief. *State v. Keith* (Aug. 19, 1998), 3d Dist. No. 3-98-05, 1998 WL 487044.

{¶ 13} In September 1999, Keith filed a habeas corpus petition in the United States District Court, presenting eight grounds for relief.

{¶ 14} In June 2001, the United States District Court denied Keith's petition for habeas corpus. Thereafter, Keith appealed the denial and sought a certificate of appealability.

{¶ 15} In March 2003, the United States Court of Appeals granted a certificate of appealability on six of Keith's grounds for relief.

{¶ 16} In August 2004, Keith filed a second petition for postconviction relief with the trial court, setting forth three grounds for relief: (1) that the trial prosecutors did not timely provide defense counsel

with all relevant exculpatory evidence, (2) that new information received after the trial indicated that two persons were involved in the homicides and that there was another possible suspect, and (3) that the cumulative effects of these errors deprived him of fundamental fairness, resulting in his conviction and sentence being void or voidable. Keith submitted the following seven "exhibits" as documentary evidence in support of his petition:

> **Exhibits 1 and 2. "[T]he prosecutor had actual or constructive possession of police reports that memorialized that [sic] at least one eyewitness report that merely described a "pretty big guy with a mask". [Exhibit 1] This eyewitness makes a second statement after talking with Captain Michael Corwin wherein he claims that the person was Kevin Keith. [Exhibit 2] The first statement was never turned over to the defense." [By implication, the second statement was turned over to the defense.]**
>
> **Exhibit 3. "The prosecutor had actual or constructive knowledge that this eyewitness also stated that Kevin Keith was too big to be the shooter. [Exhibit 3] This information was not turned over to the defense."**
>
> **Exhibit 4. "The prosecutor presented John Foor as a witness in rebuttal. Foor testified that Richard Warren wrote the name "Kevin" on notepaper, but that he did not keep that paper. (T. 778-780) No notes were turned over to the defense. Six**

pages of notes actually existed. [Exhibit 4] These notes reveal the name "Kevin" in what clearly appears to be different handwriting from the rest of the writing, which obviously is Richard Warren's. The notes also reveal the name "Damon"- another person involved in drug sales in the area."

Exhibit 5. "The prosecutor had actual or constructive knowledge that Rodney Melton was under indictment from Crawford County for drug sales occurring on August 31, 1993. [Exhibit 5] The apparent informant in that case was Rudell Chatman. Chatman was the informant in a pending indictment Kevin Keith faced for drug sales alleged to have occurred on August 31, 1993. The State claimed the motive for the killings was the fact that Rudell Chatman informed on Keith. The prosecutor did not turn over any information regarding the fact that Rudell Chatman had also informed on Rodney Melton."

Exhibit 6. "New information received after the trial indicates that two persons were involved in the homicides."

Exhibit 7. "New information also indicates that the lead investigator helped Rodney Melton, a suspect in the crime, with clearing up some matter involving Melton living at the scene of the crime. No information was provided to the defense

about the ongoing relationship between the lead investigator and Rodney Melton."

Judgment entry at 17-18. Keith also requested that he be permitted to conduct discovery, that he be permitted to amend his postconviction petition upon completion of discovery, that his capital convictions and sentences be vacated and that an evidentiary hearing be conducted on the matter.

{¶ 17} In September 2004, the state moved for summary judgment against Keith's second petition for postconviction relief on the basis that all issues presented were barred by res judicata and because the petition was untimely pursuant to R.C. 2953.21.

{¶ 18} In July 2006, the United States Court of Appeals denied Keith's writ of habeas corpus. *Keith v. Mitchell* (C.A.6, 2006), 455 F.3d 662, petition for rehearing denied en banc (C.A.6, 2006), 466 F.3d 540, certiorari denied (2007), --- U.S. ----, 127 S.Ct. 1881, 167 L.Ed.2d 369.

{¶ 19} In February 2007, the trial court granted summary judgment in favor of the state and against Keith on his second petition for postconviction relief[2] and, alternatively, dismissed Keith's petition in a 35-page opinion, without permitting discovery or an evidentiary hearing. In doing so, the trial court stated:

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[2] The lengthy delay between Keith's second petition for postconviction relief and the trial court's judgment entry resulted from a stipulation between Keith and the state that the petition should be suspended pending a decision by the United States Court of Appeals on the writ of habeas corpus.

> **The essence of Kevin Keith's successor Petition for Post Conviction Relief is that the newly discovered evidence demonstrated in the proffered exhibits supports a collection of *Brady* violations, and that these exhibits, as a whole, support a theory of innocence. On this issue, this court finds that reasonable minds can come to only one conclusion-that being unfavorable to [Keith] and favorable to the State. This court finds that, on the face of the record the evidence offered by [Keith] fails to demonstrate substantive grounds for relief. This court notes that, according to the United States Court of Appeals for the Sixth Circuit, [Keith] does not contend that he is actually innocent.**

{¶ 20} In making this determination, the trial court cited "overwhelming evidence" against Keith, including the following:

> **1. Approximately 8 hours after the shootings, Richard Warren, while recovering from surgery, wrote the name "Kevin" on a piece of paper as the name of his assailant.**
>
> **2. Later in the day, Warren selected Kevin Keith from a photo array of six individuals.**
>
> **3. Investigators recovered a total of twenty-four cartridge casings from the**

crime scene area, which had all been fired from the same gun.

4. On the night of the murders, [Keith] picked up his girlfriend, from work at the entrance to the General Electric plant where another matched casing was found.

5. Nancy Smathers, a resident of the Bucyrus Estates, heard popping noises, looked outside her window on the night of the murders, and observed a large stocky man making his escape, whom she was able to identify six weeks later as Kevin Keith, from a television news story depicting [Keith].

6. The man Smathers identified jumped into a light-colored, medium-sized car, a description consistent with the automobile Kevin Keith was known to have had access.

7. Smathers witnessed a number of events: the car slid into a snow bank; the perpetrator got out to rock the car, but the dome light did not operate when the driver's door opened; the light for the license plate was out; the perpetrator was able to free the vehicle from the snow bank.

8. At the snow bank where Smathers witnessed the getaway car slide, investigators made a cast of the tire tread and of the indentation in the snow bank

made by the car's front license plate number-"043."

9. The indentation from the license plate matched the last three numbers of a 1982 Oldsmobile Omega seized from Melanie Davison shortly after she visited [Keith] in jail, under the pseudonym "Sherry Brown" a few weeks after the murders.

10. The Oldsmobile was registered to Alton Davison, Melanie's grandfather, and was also regularly used by Melanie. Alton Davison had put four new tires on the Omega six months prior to the murders. He estimated that by February 1994, the new tires had been driven less than 3,000 miles without any problems or need for replacement.

11. The cast taken of the tire tread at the crime scene did not match tires found on the Oldsmobile Omega one month later, but the cast did match the tread of the tires purchased by Alton Davison-this, based upon the tire brochures.

12. The tires found on the Oldsmobile Omega after the murders had been manufactured but a month before the murders.

13. It will be recalled that the perpetrator put a gun to Marichell's head, complaining bitterly about Marichell's brother "ratting on people." Rudel Chatman, the victim's

brother was a police informant in a drug investigation involving Kevin Keith. And the month prior to the murders, Keith was charged with several counts of aggravated drug trafficking.

14. The description of the vehicle by Nancy Smathers-a light colored, medium-sized car-generally fit the description of the Oldsmobile Omega owned by Alton Davison and frequently driven by his granddaughter Melanie, one of the girlfriends of Kevin Keith.

15. The description of the perpetrator by Nancy Smathers-a large, stocky black man-generally fits and continues to fit (from this court's observation of [Keith] at the hearing) [Keith].

16. It will be recalled that after drinking a glass of water through a pulled-up portion of a turtleneck sweater, the perpetrator pulled a nine-millimeter handgun from a plastic bag that he was carrying. Kevin Keith was seen earlier in the day in the neighborhood by a neighbor while he (Keith) was carrying a bag.

On March 15, 2007, Keith appealed the trial court's denial of his second post-conviction motion, which this Court affirmed on February 25, 2008. *Keith*, 2008-Ohio-741.

{¶ **21**} On August 1, 2007, while his appeal to this Court was pending, Keith filed a motion to file a

delayed motion for new trial and a motion for a new trial.

{¶ 22} On August 3, 2007, Keith filed a motion to re-open pursuant to App.R. 26(B) with this Court, which we denied. The Ohio Supreme Court affirmed our judgment on August 7, 2008. *State v. Keith,* 119 Ohio St.3d 161, 2008-Ohio-3866, 892 N.E.2d 912.

{¶ 23} On March 28, 2008, Keith filed a motion for an evidentiary hearing for his motion for new trial. On April 10, 2008, Keith filed an appeal of this Court's February 25, 2008 decision with the Ohio Supreme Court.

{¶ 24} On July 2, 2008, the trial court denied Keith's motion to file a delayed motion for new trial, motion for evidentiary hearing, motion for new trial, and any and all ancillary motions.

{¶ 25} On July 7, 2008, Keith filed an appeal of the trial court's denial of his motions with this Court. Keith now appeals this judgment asserting three assignments of error for review. We have elected to address these assignments of error collectively but out of the order listed in Keith's brief.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF RES JUDICATA TO APPELLANT'S CLAIMS.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN EVALUATING AND DENYING APPELLANT'S MOTION FOR NEW TRIAL UNDER THE USUAL STANDARDS FOR NEW TRIAL, WHEN THE NEWLY DISCOVERED EVIDENCE WAS AVAILABLE TO THE PROSECUTION AND NOT SUBMITTED TO THE DEFENSE.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE ARBITRARY AND INACCURATE.

{¶ 26} In his second assignment of error, Keith argues that the trial court erred in finding that his claims were barred by the doctrine of res judicata. We disagree.

{¶ 27} Keith identified four allegedly new pieces of evidence in support of his Crim.R. 33(A)(6) motion for a new trial: (1) on January 31, 1994, Rodney Melton, a known drug dealer, told a confidential informant "that he had been paid $15,000 to cripple 'the man' who was responsible for the raids in Crestline, Ohio last week[ ]"; (2) the victim, Richard Warren, never told nurse "Amy Gimmets" that the assailant's name was "Kevin" because no "Amy Gimmets" ever worked for the hospital; (3) eyewitness Nancy Smathers' testimony indicates that the getaway car was "white, cream, light yellow" in color, which matches Melton's car, not the vehicle Keith allegedly drove; and (4) Melton's car tires were never analyzed to determine whether they had a similar tread design to that of the getaway car.

{¶ 28} With regard to Keith's contentions concerning Smathers' testimony, this could have been raised as an error on direct appeal or in his postconviction petition. Smathers testified at trial and her testimony appears in the transcript. As such, any error predicated upon this testimony is now res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Furthermore, this Court notes that Melton testified at trial that he owned a "light tannish, cream" 1979 Chevy Impala; and therefore, this evidence was before the jury and was not new evidence as Keith alleges. (Jan. 17, 1995 Tr. Vol. IV at 675). As to Melton's tire tread matching that of the getaway car, this is an issue that could have been explored by defense counsel at trial. The State certainly would not have presented this evidence in a prosecution against Keith. Furthermore, this too could have been raised as an issue on direct appeal or, at the latest, in his *second* post-conviction petition and is now, therefore, res judicata. *Perry,* 10 Ohio St.2d 175, paragraph nine of the syllabus.

{¶ 29} Keith's first and second alleged new pieces of evidence are similarly barred under the doctrine of res judicata. In his second post-conviction petition, Keith argued that the prosecution knew that Melton had the same motive to commit the crime as he did but failed to disclose this information. (Doc. No. 116). Keith now claims to have more information implicating Melton and, thereby, exonerating him. The trial court denied Keith's post-conviction petition, and this Court affirmed. Accordingly, this issue has been argued before and is now barred. *Perry,* 10 Ohio St.2d 175, paragraph nine of the syllabus.

{¶ 30} Keith also alleges that hospital records reveal that no nurse by the name of "Amy Gimmets" has ever worked at the hospital where the victim was treated. Accordingly, Keith argues that Captain Stanley must have lied when he testified that Gimmets told him that the victim stated "Kevin" was the assailant. Keith filed a motion to suppress the victim's in-hospital identification, and the fact that no "Amy Gimmets" worked at the hospital could have been discovered during that time. Furthermore, the nurse's identity could have been discovered during the course of the trial and used as impeachment, or, at the latest, it certainly could have been raised on direct appeal or in one of Keith's post-conviction petitions. Under these circumstances, we find this issue barred as well. *Perry*, 10 Ohio St.2d 175, paragraph nine of the syllabus.

{¶ 31} For all these reasons, we find that the trial court did not err in concluding that Keith's arguments were barred by the doctrine of res judicata.

{¶ 32} In his first assignment of error, Keith argues that the trial court erred by failing to utilize the standards under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 and instead used the traditional Crim.R. 33(A)(6) standard. Even if we were to agree with Keith's argument, he has failed to establish a *Brady* violation, because he has failed to show that the evidence was material.

{¶ 33} "The United States Supreme Court has held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad

faith of the prosecution.'" *State v. Grifin*, 3d Dist. No. 1-03-31, 2004-Ohio-287, ¶ 9, quoting *Brady*, 373 U.S. at 87. However, *Brady* does not apply "'unless the evidence is material to mitigation, exculpation or impeachment.'" *Griffin*, 2004-Ohio-287, at ¶ 9, quoting *State v. Keene* (1998), 81 Ohio St.3d 646, 693 N.E.2d 246, citing *Calley v. Callaway* (C.A.5, 1975), 519 F.2d 184, 221. "'[E]vidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Griffin*, 2004-Ohio-287, at ¶ 9, quoting *State v. Yarbrough* (Apr. 30, 2001), 3d Dist. No. 17-2000-10, at *8.

{¶ 34} The trial court found, and we agree, that there is no reasonable probability that the aforementioned evidence, if disclosed, would have changed the outcome. Much of the evidence was already presented at trial, if not directly at least inferentially. Furthermore, a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals. This case was before this Court as recently as February 25, 2008 on Keith's second post-conviction petition. We were not persuaded then, nor are we now, that Keith has suffered prejudice sufficient to merit a reversal of the trial court's judgment.

{¶ 35} Finally, in his third assignment of error, Keith argues that the trial court's judgment was arbitrary and inaccurate. We disagree. Although the trial court made some apparent typographical errors, this does not mean that its decision was "arbitrary" as Keith argues. This Court has reviewed the trial court's judgment entry and finds that it is not arbitrary. This

Court also agrees with the trial court's judgment that Keith's claims are barred by the doctrine of res judicata, and, even if not barred, would not have changed the trial's outcome.

{¶ 36} Keith's first, second, and third assignments of error are overruled.

{¶ 37} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

WILLAMOWSKI and ROGERS, JJ., concur.

APPENDIX B

IN THE COURT OF COMMON PLEAS
CRAWFORD COUNTY, OHIO

CASE NO.: 94–CR–0042

[Dated July 1, 2008]

State of Ohio,	)
	)
Plaintiff—	)
	)
vs.	)
	)
Kevin KEITH,	)
	)
Defendant—	)
	)

JUDGE: THOMAS PATRICK CURRAN
On Assignment, Art. IV, Section 6
Ohio Constitution

OPINION AND JUDGMENT ENTRY DENYING DEFENDANT KEVIN KEITH'S MOTION FOR LEAVE TO FILE A DELAYED MOTION FOR NEW TRIAL

OPINION AND JUDGMENT ENTRY DENYING DEFENDANT KEVIN KEITH'S MOTION FOR LEAVE TO CONDUCT DISCOVERY AND DENYING MOTION FOR NEW TRIAL

AND DENYING ANY AND ALL ANCILLARY MOTIONS

This is a Death Penalty Case.

THIS IS A FINAL JUDGMENT

I. INTRODUCTION

The Defendant Kevin Keith has filed a "Motion for Leave To File A Delayed Motion For New Trial." The Defendant, tracking the language of Rule 33(B) of the Ohio Rules of Criminal Procedure, claims that he was "unavoidably prevented from discovering the evidence" upon which he relies until well after 120 days had elapsed from the date of the verdict. In fact, this court finds that the Defendant is unable to establish by clear and convincing evidence that he has been unavoidably prevented from discovering exculpatory evidence, much less has he been able to establish perjury on the part of police officers as he alleges. Criminal Rule 33(B) provides as follows:

> Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was

unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

This court has carefully reviewed the Defendant's motions, together with the points of law outlined in support thereof, and has concluded that the Defendant's manifold motions and arguments are but a variation of an identical theme arrayed in different motion practice, but thoroughly explored and rejected by this court and by the Court of Appeals *in the very recent past.* On February 13, 2007, this court filed an extensive Opinion and Judgment Entry that it authored granting the State's Motion for Summary Judgment on Kevin Keith's Successor Petition for Post Conviction Relief. In addition, this court dismissed the Petition, in the alternative, and also filed findings of fact and conclusions of law. At that time this court also entered an order denying discovery. From this Judgment Entry the Defendant—Petitioner secured new attorneys and proceeded to prosecute his appeal to the Ohio Court of Appeals for the Third District without success. But while that appeal was pending

before the Third District, the Defendant proceeded to engage in the instant motion practice.

II. PROCEDURAL HISTORY OF THE CASE

The procedural history of this case is extensive and has been thoroughly reviewed in this court's Judgment Entry of February 13, 2007, as well as the affirmance of the judgment by the Ohio Court of Appeals in State v. Keith. 2008-Ohio-741 (3d District, 2-25-2008). The defendant was convicted of the execution-style capital murder of Maricheil D. Chatman, her aunt Linda Chatman, and Marichell's seven-year-old daughter Marchae Chatman. In addition to these shooting victims, the defendant was also convicted of the attempted murder of Marchae's young cousins Quanita Reeves and Quinton Reeves and Richard Warren, the latter a house guest of Marichell at the time of the events. These three survivors, including a four-year-old, and a seven-year-old, were seriously wounded. The defendant was sentenced to death in 1994. Experienced trial counsel represented him at the trial, and with new and also experienced appellate attorneys, Kevin Keith embarked on a journey of appellate review, collateral state post conviction pursuits and federal habeas corpus—all without success. With yet another set of experienced professional attorneys, Kevin Keith seeks a new trial, based on newly discovered evidence. In fact, as will be explained, there is nothing new here.

III. EVIDENCE ON GUILT

With yet another set of experienced professional attorneys, Kevin seeks a new trial, based on newly discovered evidence. Evidence that Kevin Keith was

the person who committed these crimes has stood the test of time, and has survived multiple attacks from different sets of defense counsel engaging different theories—from essentially attacking the penalty phase of the jury trial, and fairly well conceding guilt, to new claiming innocence. Once again, but in brief, this court will recount the evidence supporting the jury verdicts in this capital murder case.

Richard Warren had been living with Marichell Chatman and her seven-year-old daughter Marchae for several weeks at Marichell's apartment complex known as the Bucyrus Estates. On the evening of February 13, 1994, shortly before nine o'clock in the evening, Richard Warren was watching television when a man appeared at the door, but began to walk away without knocking. Warren opened the door and the man turned and asked for Linda Chatman. Linda had arrived at the apartment but a few minutes earlier to retrieve her children Quanita and Quinton. Linda was the aunt of Marichell and Marichell had been baby sitting the children. When Linda went outside to speak with the man, Marichell told Warren the man's full name and mentioned that be had been involved in a drug bust. Warren could not remember his last name, but he did recall that his first name was "Kevin." After a short while, the man known as Kevin returned to the apartment with Linda. He drank a glass of water through a turtleneck sweater that had been raised above his mouth. He scolded Marichell for addressing him as "Kevin" when she asked him what he was doing and why. He pulled a nine millimeter hand gun from a plastic bag he was carrying, ordered everyone on the floor, put the gun to Marichell's head and remarked that her brother was "ratting" on people. Kevin began to fire-his weapon. Warren heard

as many as ten to 12 shots. Warren received three rounds —one in his jaw and two more in his back. He heard the door close and then escaped himself across a snow-covered field toward Ike's Restaurant. Four or five more shots were fired in his direction, one striking him in the buttocks and knocking him down. Somehow, Richard Warren—having now received a total of four rounds—survived to testify in court and to identify Kevin as Kevin Keith. In fact, he identified Kevin from a photo array submitted at the hospital, the day after the shootings. He also communicated the name "Kevin," upon recovering from surgery. But there was much more to the evidence than the mere identification of Kevin Keith by Richard Warren. The State established inferentially that Kevin Keith had access to the getaway car, a light colored medium sized vehicle, whose license plate included the numbers "043"—numbers imprinted in the snow bank at the Bucyrus Estates the night of the murders. Nancy Smathers, another resident of Bucyrus Estates, identified Kevin Keith as the driver of that vehicle, while he was stuck in the snow bank. Smathers bad heard "popping noises" at about nine o'clock in the evening. She saw a "stocky black man" running to the parking lot, getting into the vehicle, attempting to speed away, and then sliding into a snow bank. That Kevin Keith had access to this vehicle—plate number in part "043"—was established under a compelling set of circumstances. One of the Defendant's girlfriends visited Keith at the jail a few weeks after the murders, registering under the fictitious name of "Sherry Brown." Her real name: Melanie Dawson. Her vehicle: a light-colored 1982 Oldsmobile Omega owned by her grandfather. License plate's last three numbers: "043." The corroboration convincingly continues. Although Melanie's grandfather had purchased a full set of tires

only six months before the murders—tires whose tread pattern (from advertised brochures) matched casts taken by detectives in the snow, the vehicle was now equipped with four new tires, whose date of manufacture was but a month before the murders, meaning that a vehicle, whose set of tires were only in service for six months—less than 3,000 miles—was suddenly equipped with another new set of tires, whereas the owner of the vehicle would testify that he did not purchase the new tires and authorized no one else to do so; and that his granddaughter Melanie—the Defendant's girlfriend—was a regular user of this vehicle. Further supporting the theory that this was a one-person mass murder: all of the casings recovered from the crime scene were from the same nine-millimeter weapon. Some two-dozen casings were recovered. One such matched casing was recovered miles away at the entrance to a GE plant. It was established that Keith had picked up another girlfriend at the plant on the night of the murders. Finally, Kevin Keith was observed in the vicinity of the crime scene earlier in the day carrying a bag. Recall that the perpetrator pulled the weapon from a bag.

In its opinion affirming the conviction on direct appeal, the Ohio Supreme observed:

> The evidence supports beyond a reasonable doubt that appellant murdered Marichell, Marchae and Linda Chatman, and attempted to kill Richard Warren and Quanita and Quinton Reeves as part of a course of conduct involving the purposeful killing or attempt to kill two or more persons. R.C. 2929.04(A)(5).
>
> 79 Ohio St. 3d at 537

In brief, then, Kevin Keith had the motive,[1] the means, and the opportunity to have murdered three innocent victims, and to have attempted to murder three more innocent victims. Both direct and circumstantial evidence pointed to his guilt.

In response to the multiple claims that purport to support the Defendant's Delayed Motion For New Trial, the State has painstakingly recited—witness by witness—the evidence supporting the verdicts of capital murder. There is no need for this court to repeat that exercise. However it will be helpful to analyze the recent major contentions of the Defendant.

IV. THE DEFENDANT'S CLAIMS

The Defendant now claims that the positive identification of his guilt is unreliable. He proposes theories that the nurse treating Richard Warren is either a fiction or that the police gave false testimony about information the nurse allegedly communicated to the detectives. The Defendant also claims that one Rodney Melton "planned to cripple Rudel Chapman," and because Rudel's sister Marichell Chatman was one of the victim's of the killings at the Bucyrus Estates, this somehow points to the Melton brothers, known drug dealers, as the actual perpetrators of the Chatman murders. The Defendant theorizes in his Motion For A New Trial that the Pharmacy Board investigator describes him (Kevin Keith) as "the main cocaine supplier to the Meltons." A further part of the theory is the argument that if Kevin Keith had such a

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[1] It was established that Rudel Chatman, Marichell's brother, had been a police informant against Kevin Keith in a drug case.

well-documented "major role in drug trafficking" why would he have committed these murders if Rudel was "ratting" on him for the "small" amount of cocaine for which he was charged [?]"[2] Continuing with this collection of non-sequiturs, the Defendant adds that Bruce Melton offered to "bust a 'big cocaine dealer' from his county" at a time when Kevin Keith was already on death row for some 18 months. Finally, the Defendant now contends that Captain John Stanley must have lied on the witness stand about a certain telephone conversation he had with a recovery room nurse. According to Stanley the nurse told him that Richard Warren was awake, able to speak, and had mentioned the name "Kevin." According to Nurse Amy Wishman Padgett, in an affidavit filed with the instant motion, she did call the police department to advise the police that Warren was physically able to speak, but she did not hear him say "Kevin," did not ask him the identity of the perpetrator; and, for herself, did not want to know.[3] This collateral peripheral evidence is similar in import to the claim that the name "Kevin" in PCR Exhibit 4 does not appear to be in Richard Warren's handwriting, an issue thoroughly explored and explained in footnote 10 of this court's judgment entry dismissing Kevin Keith's Petition for Post

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[2] Kevin Keith was free on bond on the night of the murders, under a four-count drug trafficking indictment. Rudel Chatman had been working undercover in a covert drug operations unfit for the Galion Police Department and was largely credited, according to the evidence, with the filing of charges against Kevin Keith.

[3] But see the trial transcript referenced in Section V of this opinion regarding Nurse Amy Gimmits message to Captain Stanley.

Conviction Relief.[4] But all of this hyperbole, as in past motion practice, ignores the fact that Richard Warren survived to testify in the flesh and to identify Kevin Keith as the person who attempted to murder him—the same person who slew three occupants of that apartment on the evening of February 13, 1994. The issue for this court, and inevitably for higher courts, is whether the positive identification of Kevin Keith by Richard Warren and, parenthetically, the positive identification of Kevin Keith by Nancy Smathers, has been tainted by police misconduct. Because there is an absence of any evidence of police misconduct, there is no taint. Kevin Keith's claims to the contrary—revisited once again—find no support by any hard evidence. In short, there is really no evidence that police conduct was "impermissible suggestive" so as to give rise to the "substantial likelihood of misidentification."

In summary, then, the Defendant's claims in support of a new trial are:

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[4] The name "KEVIN" evidently is written (or hand printed, if you will) in a hand different from the apparent handwriting of Richard Warren—all of this at a time when he (Warren) was *in extremis* following surgery. Remarkably, in a *pro se* filing on December 21, 2006, the Defendant-Petitioner, referring to the trial transcript of the testimony of Warren, explains that it was not Warren who wrote "KEVIN" on the pad, but, rather, Warren's father. As the Defendant-Petition explains: Warren testified that he didn't write the name Kevin down, but that he sign [sic] language the name to his father and his father wrote the name Kevin down [citing] (Tr. P. 367-368)." The Defendant-Petitioner's reference to the trial transcript is accurate, but how this distinction casts doubt upon the essential accuracy of the Ohio Supreme Court's rendition of the facts in difficult to understand.

- The testimony of Nancy Smathers;
- The testimony of Richard Warren;
- A claim that Rodney Melton planned "to cripple" Rudel Chatman;
- A claim that Kevin Keith is the main cocaine supplier to the Meltons;
- Nurse Amy never told Captain Stanley that Richard Warren mentioned the name "Kevin";
- Captain Stanley lied under oath.

These claims will be reviewed as part of this court's findings of fact and conclusions of law.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court finds that virtually all of the claims of Kevin Keith are barred by the doctrine of res judicata, meaning that they were raised on direct appeal or could have been raised on direct appeal. Those claims that arguably center upon new evidence have been resolved against the Defendant by this court's judgment entry denying his Petition for Post Conviction Relief, as well as the affirmance of that decision by the Ohio Court of Appeals. The claims regarding the testimony of Nancy Smathers were thoroughly explored at the trial itself, under cross-examination. The claims regarding the testimony of Richard Warren, specifically that Captain Stanley lied about Nurse Amy, and inferentially that Captain

Stanley unduly influenced Warren, have been thoroughly discredited by the State's reference to the trial record. See transcript Volume 2, page 226-227: "Hi, this is Amy Gimmits, letting you know that the name of the patient—the patient has identified the assailant. I guess his first name is Kevin, *** [etc., etc]." (See page 6, State's Response in Opposition to Add to the Record by Defendant.)

The references to the Meltons were thoroughly explored at the trial. That the Meltons committed these crimes (viz., actually pulled the trigger, in lieu of Kevin Keith) is but a theoretical reed—a thin one at best.

In summary, this court finds as follows:

1. Most, if not all, of the so-called newly discovered evidence is simply not newly discovered.

2. None of the claimed newly discovered evidence is likely to change the result of this mass murder case.

3. Very little of the so-called newly discovered evidence has been discovered since the trial. In fact, what has been discovered either serves to corroborate the conviction (e.g., the name "Kevin" on a piece of paper in Richard Warren's father's handwriting, communicated via sign language by a post surgical patient) or is flatly neutral, up or down on the conviction of Kevin Keith. (e.g., letters to and/or from Chief Corwin.)

4. Most of the claimed newly discovered evidence could have been discovered in the exercise of due diligence.

5. The claimed newly discovered evidence is only remotely (if at all) material to the issues, and then merely cumulative to former evidence, but in no event does it even contradict the powerful evidence of guilt.

6. None of the material presented can be said to invoke the doctrine enunciated in Brady v. Maryland.

7. There is no evidence of police misbehavior mandating suppression of eyewitness identification; rather, this court finds under the totality of the circumstances that the evidence presented by the Defendant in his motion practice has no effect on the Ohio Supreme Court's determination that the identification in this case was reliable. And, finally

8. The combination both direct and circumstantial evidence in this case supports the finding that even were this court to grant a motion for new trial, the result would remain the same.

In conclusion, this court finds that the Defendant Kevin Keith has failed to present proof by clear and convincing evidence that he was unavoidably prevented from filing the motion within the time provided within Rule 33. The issue is also barred under the doctrine of res judicata. Furthermore, the Motion itself lacks merit. See State v. Hawkins (1993), 66 Ohio St.3d 339 at 350:

> "The decision to grant or deny a motion for a new trial on the basis of newly discovered evidence is within the sound discretion of the trial court and, absent an abuse of discretion, that decision will not be disturbed. State v. Williams (1975), 43 Ohio St.2d 88, 72 O.O.2d 49, 330 N.E.2d 891, paragraph two of the syllabus. In State v. Petro (1947), 148 Ohio St. 505, 36 O.O. 165, 76 N.E.2d 370, syllabus, this court held that: "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. ***' (Citation omitted.)"

Whether the evidence is even newly discovered remains to be seen. But there are no real probabilities that the outcome of the trial would be different. The evidence of guilt was convincing.

VI. ORDERS

1. The Defendant's Motion For Leave to File a Delayed Motion for New Trial, under Criminal Rule 33 is denied. **Final.**

2. The Defendant's Motion for Leave to Conduct Discovery is denied. **Final.**

3. The Defendant's Motion for an Evidentiary Hearing is denied. **Final.**

4. The Defendant's Motion for New Trial, pursuant to Criminal Rule 33 is denied. **Final.**

5. Any and all, ancillary motions of the Defendant are hereby denied. **Final.**

IT IS SO ORDERED, this 1st day of ~~June~~ July 2008.

/s/ Thomas P. Curran
JUDGE THOMAS P. CURRAN
On Assignment, Art.IV, Section 6
Ohio Constitution

To the Clerk of Courts: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT UPON ALL COUNSEL OF RECORD BY ORDINARY MAIL.

/s/ Thomas P. Curran
Judge Thomas P. Curran

APPENDIX C

THE SUPREME COURT OF OHIO

Case No. 2009-0105

[Filed December 2, 2009]

State of Ohio	)
	)
v.	)
	)
Kevin Keith	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Crawford County Court of Appeals; No. 30815)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

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No. 09-1052

APR 30 2010

In the Supreme Court of the United States

KEVIN KEITH,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS FOR THE THIRD DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, after finding new information is immaterial and would not have changed the result of a trial under *Brady v. Maryland*, 373 U.S. 83 (1963), a court commits constitutional error by also noting the verdict was supported by sufficient evidence and had been subjected to appellate review?

Whether the Ohio Court of Appeals erred in denying a Motion for New Trial filed thirteen years after the judgment and that relied upon untimely and immaterial information?

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INTRODUCTION

The Ohio Court of Appeals denied Kevin Keith's Motion for a New Trial for two reasons: first, none of Keith's "newly discovered" information was material; and second, none of it was "newly discovered." This Court should decline to grant certiorari because the Ohio court was correct on both points.

Nonetheless, Keith now argues that the Ohio Court of Appeals *relied* upon the sufficiency of the evidence to deny his *Brady v. Maryland* claim. The court did no such thing. Rather it clearly stated that the information was not "material" under Brady. It did mention, additionally, that there was sufficient evidence presented at trial, just as it mentioned that Keith's case had been exhaustively reviewed. But it never suggested that its *Brady* decision relied on either of those facts.

And the Court of Appeals correctly found that Keith could have discovered his "newly discovered evidence" long before 2007. Because he ignored those opportunities, the courts procedurally barred him from relief.

In sum, Keith's claims are meritless and stale because they rely on immaterial evidence that had been available to him for years. Accordingly, this Court should decline to grant the Petition for Certiorari.

COUNTERSTATEMENT

A. Keith was convicted and sentenced to death for murdering three people and attempting to murder three others.

Kevin Keith ended three lives—and nearly ended three more—on the night of February 13, 1994. He murdered Marichell Chatman; her four-year-old daughter Marchae; and her aunt, Linda Chatman. He also shot and wounded Marichell's two cousins, seven-year-old, Quanita, and four-year-old Quinton Reeves; and her boyfriend, Richard Warren. The Chatmans were killed merely because they were a sister, a niece, and an aunt to confidential informant Rudel Chatman. Warren and the Reeves children were shot for no other reason than their misfortune of being at the apartment.

When Keith arrived at Marichell Chatman's apartment, Marichell told Warren the man's name was "Kevin". A short time later, Keith entered the apartment, pulled out a nine-millimeter handgun from a garbage bag, and told everyone to get down on the floor. Marichell called Keith "Kevin" several times while pleading for him not to shoot. He told her to "shut up" and to stop using his name. He also said, "You should have thought of this before your brother started ratting on people." *Ohio v. Keith*, 1996 Ohio App. LEXIS 1720, *4 (Oh. Ct. App. 1996).

Keith then shot everyone in the apartment and fled the scene. Despite having been shot three times, Warren was able to stand up and run for help, but Keith noticed him and shot him again.

Eyewitness Nancy Smathers heard the gunshots, and saw a man she later identified as Keith leave the

apartment. She watched Keith get into a light-colored, mid-sized vehicle and slam into a snow bank, getting stuck for a few minutes before speeding away. The police later discovered tire prints and a partial license plate imprint of "043" from the snow bank, and were able to match the vehicle to a 1982 Oldsmobile Omega, operated by Melanie Davidson, Keith's girlfriend. *Keith*, 1996 Ohio App. LEXIS at *6.

Warren also helped identify Keith as the shooter. While recovering from surgery, Warren provided hospital staff with the name of his assailant, "Kevin," by using sign language with his father. Nurse John Steven Foor also testified that when asked who had shot him, Warren communicated the name "Kevin" to the hospital staff after his surgery. At that time, Warren had not had any contact with police, and Foor explained that he called the police to tell them about the name Warren provided. Tr. 780.

Then, during Warren's police interview, he identified Keith from a name array with 75% certainty and a photo array with 95% certainty. Warren also made an in-court identification.

Police also recovered a bullet casing outside the entrance road of the local General Electric plant, where Keith had picked up another girlfriend from work on the night of the murders. This bullet casing matched all the other casings found at the crime scene and was fired from the same weapon.

B. Keith was aware that there was another potential suspect in the crime.

To shift suspicion from himself, Keith called Rodney Melton as a witness to demonstrate that Melton also had a motive to kill Rudel Chatman or his family. Melton agreed that he owned a light-colored vehicle, similar in description to the shooter's vehicle, and that part of the license plate number for that vehicle was "043." Tr. 675. Melton acknowledged his quick arrival to the crime scene and that he already knew what type of bullets were used in the shooting before talking with police. He also appeared at the hospital a short time later to inquire about the surviving victims' conditions. Melton further admitted that he, along with Keith, was involved in the drug trafficking bust where Rudel Chatman was the police informant. Tr. 758. Melton also owned up to telling the Chatman family that the shootings likely occurred as a result of Rudel's "snitching" about the drug raid. He even testified on cross examination that he warned Chatman "to watch his back" because Chatman was suspected as the informant.

C. Keith's *Brady* claims were considered and rejected by the Ohio Court of Appeals in both a 2004 postconviction relief petition and the 2007 Motion for Leave to File a Delayed Motion for New Trial.

In 2004, Keith filed a postconviction relief petition arguing that the State had withheld exculpatory evidence related to Rodney Melton. The Ohio courts determined that the information was

immaterial. *State v. Keith*, 891 N.E.2d 1191, 1200 (Oh. Ct. App. 2008).

Keith filed a "Motion for Leave to File a Delayed Motion for New Trial" in the Crawford County Court of Common Pleas on August 1, 2007, citing to Rule 33(B) of the Ohio Rules of Criminal Procedure. Pet. App. B. He claimed he had discovered new evidence withheld by the prosecution, and he alleged that he was unable to discover this information until after the 120-day period from his trial verdict. The trial court denied the motion.

Keith appealed to Ohio's Third District Court of Appeals, which affirmed the trial court's decision. *State v. Keith*, 2008-Ohio-6187, ¶33, 2008 Ohio App. LEXIS 6187 (Oh. Ct. App. 2008), *discretionary review denied* 917 N.E.2d 811 (Ohio 2009), Pet. App. A. It agreed with the lower court that Keith's claims were procedurally barred because the information could have been discovered and raised in the 2004 petition. *Id.* at ¶29. The Court of Appeals also analyzed Keith's claims under *Brady* to determine that no *Brady* violation had occurred because the new evidence was immaterial.

Keith filed an appeal with the Ohio Supreme Court, but that court declined jurisdiction and dismissed the appeal for not presenting any substantial constitutional question. *Ohio v. Keith*, 917 N.E.2d 811 (Ohio 2009), Pet. App. C.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Keith's Petition does not deserve review from this Court because this Court can only grant relief if it *presumes* error where none exists. Most of Keith's argument is based on a fallacy: that the Ohio Court of Appeals *relied* on the sufficiency of the evidence when it denied Keith's *Brady* claim. It did not do so. This Court could only find error if it begins with the presumption that the lower court was wrong and then contorts the lower court's decision to reach that conclusion.

Moreover, Keith's "new" evidence was discoverable years ago, so his *Brady* claims are *res judicata* under Ohio law, and therefore particularly ill-suited to the untimely review Keith now seeks. But even if his claims were timely, which they are not, the "new" information was immaterial under *Brady*. The information does not contradict or exculpate Keith's guilt, and most of it is cumulative with evidence that was introduced. Its absence, then, would not have cast doubt on the fairness of Keith's trial, and it would not have changed the jury's verdict.

For all of these reasons, the State of Ohio respectfully requests this Court deny Keith's Petition for certiorari.

A. The Ohio Court of Appeals applied *Brady* correctly and found that Keith's new evidence was immaterial.

Keith's argument, like a house of cards, is only as strong as its most poorly placed card, and in Keith's case that card is untenable. The central premise of

Keith's argument is the Ohio Court of Appeals *relied* upon the sufficiency of the evidence to deny his *Brady* claim. But that simply is not so. To be sure, the Court of Appeals did *mention* the sufficiency of the evidence, but only as a passing aside *after* it had rejected Keith's *Brady* claim.

And so, while the State agrees with Keith and his *amicus curiae* that a court cannot rely solely upon the sufficiency of the evidence to deny a *Brady* claim, that point is irrelevant here.

This Court need look no further than the Court of Appeals' decision to see that it did not apply a sufficiency of the evidence test: "[Keith] has failed to establish a Brady violation, because he has failed to show that the evidence was material. . . . The trial court found, and we agree, that there is no reasonable probability that the aforementioned evidence, if disclosed, would have changed the outcome." *Keith*, 2008-Ohio-6187 at ¶¶32, 34.

A sufficiency of the evidence test looks only at the record in the light most favorable to the State; it does not, as the Ohio courts did here, consider the import of undisclosed evidence and the effect it would have had on the trial. Thus, the Court of Appeals applied the correct standard.

The Court of Appeals was not required to say anything more on the subject to meet constitutional muster. Nonetheless, in an abundance of caution, the court continued: "Furthermore, a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." *Id.* at ¶34.

But these statements are a mere coda to the main point: the withheld information was immaterial, and *additionally* the court reiterated its confidence in the verdict. The Court of Appeals can no more be said to have incorporated a sufficiency of the evidence component into *Brady* than it can to have incorporated a "test of time" and "exhaustive series of both state and federal appeals" component. It did neither.

These observations are easily recognizable *obiter dicta*. The court did not state that finding new, post-trial evidence "material" is contingent upon the sufficiency of the trial evidence presented against a defendant. And no harm occurred from the court's mention of sufficiency because the court made clear its decision to deny relief based on *Brady*, both before and at the conclusion of its analysis. *Id.* at ¶¶ 32, 34.

The Court of Appeals did not rely upon the sufficiency of the evidence. And once that card is removed, the framework of Keith's argument, and the brief of *amicus curiae* Innocence Network, tumble down.

B. Keith should not be allowed to raise claims that he could have raised years before.

Even if the Court of Appeals had misapplied a sufficiency of the evidence test—which it did not—Keith was not entitled to relief. As the Court of Appeals noted, Keith had previously raised his *Brady* argument in his 2004 postconviction relief petition. And so, Keith should have filed his Motion for New Trial when he discovered the new information; he instead waited three years to do so.

His claims, then, are *res judicata*. *Ohio v. Perry*, 226 N.E.2d 104 (Ohio 1967).

More important than the procedural bar, however, are the prudential reasons this Court should not review Keith's untimely claims. Like so many capitally-sentenced inmates, Keith has adopted a policy of delay and obfuscation. He has done nothing to refute the state courts' determinations that he *could have* discovered his new evidence during postconviction, other than arguing that it may not have been discoverable because it was the "work product" of the Ohio Pharmacy Board. But Keith presented similar *Brady* evidence in his second postconviction petition, which belies his argument that he could not have discovered the related evidence.

And just as the Melton information was not new, the "Amy Gimmits" claim has been stale since Keith's trial concluded. Whether "Amy Gimmits" ever worked at Grant Medical Center was clearly an issue that could have been determined at the time of the trial. In fact, Keith could have simply called Grant Medical Center and asked to have spoken to Nurse Amy Gimmits. But he did not do so, and his failure to do so, now sixteen years old, cannot be grounds for a new trial.

Finally, *amici curiae* for Keith argue that the eyewitness testimony in this case was unreliable. See, Brief of Memory Experts, *amici curiae*. But the time for making that claim also passed sixteen years ago. There is nothing new or recent in the concept of challenging the reliability of eyewitness testimony, and this Court should not overturn convictions

merely because a group of experts second-guess the efforts of defense counsel sixteen years after the fact.

C. None of Keith's "newly discovered evidence" is material.

Keith's claims are not only untimely, they are also meritless. Evidence must be material before it can support a *Brady* violation. *Brady*, 373 U.S. at 87. In *Kyles v. Whitley*, this Court explained that undisclosed evidence is "material" if it would have a reasonable probability of changing the outcome of the trial, had the evidence been disclosed and presented at that time. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *see also, United States v. Bagley*, 473 U.S. 667, 682 (1985). Because Keith has introduced evidence similar to his previously denied *Brady* claims, he cannot demonstrate that there is a reasonable probability that this cumulative evidence would undermine the confidence of his guilty verdict.

At the outset of its merits discussion, the state court correctly found that Keith had failed to satisfy his burden under *Brady*. *Keith*, 2008-Ohio-6187 at ¶ 32. The burden to show a *Brady* violation is greater than a "preponderance of the evidence" because "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. The Court of Appeals analyzed Keith's evidence with this standard, and it correctly determined that the evidence was immaterial because "there is no reasonable probability that the aforementioned evidence, if disclosed, would have changed the

outcome [of Keith's trial]." *Keith*, 2008-Ohio-6187 at ¶34.

Even now, Keith has yet to present new, material evidence. He has provided three pieces of "newly discovered" information since his second postconviction petition: (1) Rodney Melton told a confidential informant that he was offered $15,000 to "cripple" the police informant who reported Melton's drug trafficking ring; (2) Melton's accomplice in a pharmacy robbery ring confirmed that Melton was offered money to kill Rudel Chatman; and (3) Melton was known to wear a mask during his crimes.

1. The evidence of Rodney Melton's financial motive and mask-use were not material to Keith's trial.

The fact that Melton was offered money to kill Rudel Chatman cannot explain why someone killed everyone *except* Rudel Chatman. Indeed, killing three people and shooting three others who were not part of the offer runs *contrary* to the financial motive that Keith now claims Melton had. If anything, the evidence suggests that the murderer acted with a purely retributive purpose.

And Melton's retributive motive was well known to the jury. Melton admitted at trial that he was involved in the drug trafficking bust where Rudel Chatman was the police informant. Tr. 758. He had warned Chatman "to watch his back" because Chatman was suspected as the informant. And he told the Chatman family that the shootings likely occurred as a result of Rudel's "snitching" about the drug raid. The jury was well-aware that Melton, like Keith, had a significant motive for punishing Chatman.

As for the mask evidence, the fact that a criminal has been known to obscure his face does not exculpate other criminals that also choose to do so. Mask-usage is not a unique or unusual criminal characteristic. And so, the absence of this fact does not call into question the fairness of the trial as a whole.

2. There is no evidence of perjury in this case, nor could perjured testimony have been material.

Similarly, Keith's "false-testimony" claim fails because he cannot demonstrate the materiality of his new evidence. Keith claims that the Ohio Court of Appeals erred by not applying *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), to his "Amy Gimmits" false-testimony claim. But *Napue* and *Giglio* are inapplicable because they deal with knowingly false testimony.

In this case, there is no evidence that the detective intentionally falsified "Amy Gimmits," nor could there be. It is clear that the detective simply misspoke. *Keith v. Bobby*, 551 F.3d 555, 558 (6th Cir. 2009) (the record "shows that the detective testifying to Warren's initial identification in the hospital gave a garbled version of the name 'Amy Wishman' as the person who originally heard Warren mention Kevin Keith as the killer").

Indeed, it would have been absurd for the detective to intentionally falsify the nurse's name, or for the prosecutor to suborn perjury. First, the defense counsel could have quickly determined that "Amy Gimmits" did not work at Grant Medical Center—and thus an intentionally false statement would have been easily exposed. Second, another

nurse *actually* testified that he had heard the same thing, which would make an intentional falsehood entirely superfluous.

Morever, before addressing the perjury, "[a] finding of materiality of the evidence is required under *Brady*." *Giglio*, 405 U.S. at 154. The state court's decision to deny relief was proper precisely because the "Gimmits/Whisman" information was immaterial. *Keith*, 2008-Ohio-6187, ¶ 32, Pet. App. A. This "newly discovered evidence" does not have a reasonable probability of undermining the confidence of Keith's trial verdict because Nurse John Steven Foor testified that Warren had identified "Kevin" as the person who shot him, and that he called the police to give them that information. Tr. 777-78. And so, the existence of "Amy Gimmits" and the statement of Amy Whisman are not facts whose absence throw the fairness of the trial into doubt.

CONCLUSION

For these reasons, the Court should deny the Petition.

Respectfully submitted,

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Supreme Court, U.S.
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No. 09-1052 CAPITAL CASE

In The
Supreme Court of the United States

KEVIN KEITH,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Third District

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REPLY

The State raises three points: (1) the lower court conducted a proper *Brady* analysis; (2) the new evidence could have been discovered years earlier; and (3) the new evidence is not "material." Each point is mistaken or simply false.

First, the lower court's *Brady* analysis was just like that rejected by this Court in *Strickler v. Greene*, 527 U.S. 263, 290 (1999). Keith relied heavily on *Strickler* in his Petition; the State does not discuss it. *Second*, the new evidence could not have been discovered before 2007—it was suppressed by the State and first uncovered in 2007. *Third*, the State itself explains in detail factors suggesting that *Melton* committed this horrific crime against Rudel Chatman's family. The new evidence that Melton was actually paid to cripple Rudel just two weeks before the shootings is "material" to that inquiry. Moreover, the State suggests that the fake-nurse revelation is also not material—in large part because another nurse called the police to say that the victim identified Keith as the shooter. But that nurse's testimony was contradicted by the victim himself, as well as by the victim's hospital records.

This is not simply about the proper *Brady* analysis showing a reasonable probability that the new evidence would have led to a different outcome. It is about the reasonable probability that Ohio will execute an innocent man on September 15, 2010. Certiorari should be granted.

A. The Ohio Court's *Brady* Analysis Is The Same As The Analysis This Court Rejected in *Strickler*.

As noted in the Petition, the lower court in *Strickler* "recited the proper materiality test," but then also relied on the improper sufficiency analysis to dispose of the *Brady* claim. Pet. 11. This Court expressly rejected that approach. Here, the State—without mention of *Strickler*—relies on the same rejected reasoning: "To be sure," the State says, "the Court of Appeals did *mention* the sufficiency of the evidence, but only as a passing aside *after* it had rejected Keith's *Brady* claim." Opp. 7 (emphases in Opp.).

Indeed, the lower court here did nothing more than recite the materiality test. With no actual analysis of materiality, the lower court's glaring reference to the sufficiency of the evidence is hardly "obiter dicta"—it is the basis for denying Keith's claim. That contradicts *Strickler*.

B. This New Evidence Could Not Have Been Raised "Years Before"

Keith did not discover his new evidence in 2004 and "wait[] three years" to file it. Opp. at 8. Although the evidence from Keith's 2004 postconviction relief petition was also exculpatory, it was not the new evidence on which Keith's new-trial motion was based and is not the subject of this petition. Rather, as noted below, this new evidence was discovered in 2007 and acted upon immediately.

1. New evidence implicating Melton

In July 2007, Keith discovered the new evidence concerning Melton (e.g., that he was paid to harm Chatman and that he wore a particular mask) in the files of the Ohio Pharmacy Board. His new-trial motion, based in part on that evidence, was filed on August 1, 2007. There was no delay.

This evidence could not reasonably have been discovered earlier. The Pharmacy Board is not a place to look for evidence concerning a criminal case, as its purpose is to regulate pharmacies and "act efficiently, consistently, and impartially in the public interest to pursue optimal standards of practice through communication, education, legislation, licensing, and enforcement." *pharmacy.ohio.gov/mission.htm*. Nonetheless, Keith's counsel took a shot in the dark and made a public records request to the Pharmacy Board regarding the Meltons. *See* Cole Aff. at ¶ 2 ("I received a public records request from Rachel Troutman on July 2, 2007, for records involving Bruce and Rodney Melton and their pharmacy burglaries") (emphasis added). It paid off.

No doubt Keith was aware of the Meltons' involvement in the pharmacy burglaries and that they were being prosecuted. But knowing that the Meltons faced charges is entirely different than knowing that, during the investigation surrounding those charges, Rodney Melton told another of his plan to commit the crime for which Keith was on trial.

In any event, it is the State's burden to provide the defendant with any exculpatory evidence in its possession. As this Court has said, "A rule thus

declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Simply put, the State possessed this evidence and failed to turn it over—at the risk of not only leading the wrong person to be executed, but of leaving the real killer at large.

2. New evidence that Nurse Gimmets does not exist.

Similarly, Keith cannot be blamed for the State's suppression of the newly discovered fact that there was no Nurse Gimmets. The prosecutor elicited testimony from Bucyrus Police Officer John Stanley regarding where he "first hear[d] the name Kevin Keith." Tr. 226. Stanley answered that it was from Richard Warren's nurse, "Amy Gimmets." *Id.* Stanley re-iterated this later on in the trial: he "spoke with a nurse by the name of Amy Gimmets," it was "from her" that he first heard the name "Kevin" used, and that conversation occurred "shortly after noon." *Id.* at 770-71, 774. By repeatedly providing the defense with the wrong name, the State suppressed the true identity of the nurse who called Stanley. Defense counsel had no reason to believe that Captain Stanley would testify falsely about the substance of his conversation with Warren's nurse. A veteran police officer perjured himself, and Keith cannot be faulted for failing to uncover the State's lies earlier.

Furthermore, ten years ago, former habeas counsel requested discovery with regard to "the nurse who apparently confirmed Warren's identification." *Keith v. Mitchell*, 1:99-cv-00657, Dkt. 38. But the district court

denied that request, finding that Keith failed to show good cause. No one from the State spoke up.

The State complains about the 16 years it has taken Keith to raise the claims based on his newly discovered evidence. But at no point during those 16 years did the State provide Keith with that evidence. If the State wished to expedite matters, it should have followed its constitutionally mandated duty to disclose all favorable, material evidence.

C. The New Evidence Is Material

The new evidence regarding Melton and "Nurse Gimmets" is material. As noted in the Petition, the jury had reason to consider Melton as the shooter. Indeed, the State's Brief in Opposition acknowledges in detail evidence pointing to him:

> 1) Melton owned a light colored vehicle, similar in description to the shooter's vehicle. Opp. at 4.
>
> 2) Part of the license plate number for Melton's vehicle was "043." *Id.*
>
> 3) Melton quickly arrived at the crime scene. *Id.*
>
> 4) Melton already knew what type of bullets were used in the shooting before talking with police. *Id.*
>
> 5) Melton appeared at the hospital a short time later to inquire about the surviving victims' conditions. *Id.*

6) Melton was involved in the drug-trafficking bust where Rudel Chatman was the police informant. *Id.*

7) Melton told the Chatman family that the shootings occurred as a result of Rudel's "snitching." *Id.*

8) Melton had a significant motive for punishing Chatman. *Id.* at 11.

But why didn't the jury conclude that Melton was the shooter? Two reasons: Melton did not appear to have any particular greater motivation than some others to go after Chatman or his family, and, crucially, nurses tending to Warren appeared to relay that Warren identified Keith. The new evidence eviscerates these points.

1. New Evidence Regarding Melton

A man was paid $15,000 to "cripple" someone to send a brutal message about snitching, and two weeks later, the target's family was brutally shot. The State claims that this is not material because the target (Chatman) was not actually among those shot. Suffice it to say, this evil act would certainly send the message such a payment bought.

We are no longer talking about a theoretical reason why Melton would have done this; we are talking about an actual *contract* to commit the crime. It exemplifies "material" new evidence. It is the motive the jury never knew.

But the motive doesn't stop there. The State claims that "the Reeves children were shot for no other reason than their misfortune of being at the apartment." Opp. at 2. *Keith* had no motive to shoot the Reeves' children, though the same cannot be said for Melton.

The Pharmacy Board report shows that the Meltons had to worry about the information that Demetrius Reeves had regarding their pharmacy burglary ring. Reeves was the father of the two children who were shot, and he was an active participant in the pharmacy burglaries. Pharmacy Board rpt, pp. 29-30. Reeves "had driven on several pharmacy breaking and enterings," and he told the police that "the Meltons had probably done around 50 B&E's since their return to Ohio from prison." *Id.* at 30. Reeves had intimate knowledge of the Meltons' "racket," and he became a witness against the Meltons for the pharmacy burglary ring. *Id.* This new evidence shows that Melton had the motive to send a message to both Chatman *and* Reeves.

The State also challenges the importance of the mask evidence. Opp. at 12 But the State ignores the peculiar type of mask worn by the shooter in this case. Quanita Reeves and Richard Warren both recalled that the man who shot them wore a mask that covered his mouth. Tr. 348, 716. The pharmacy-ring informant told police that it was Melton's habit to wear a mask that covers his mouth because he has a gap between his front teeth.

In short, the State claims that "most of [the new evidence] is cumulative with evidence that was introduced." Opp. at 6. At this point, however, the additional evidence of a third party's guilt ceases being

"cumulative" and starts being exactly what it is—proof that Melton is responsible for the Bucyrus Estates shootings.

2. New Evidence That Nurse Gimmets Does Not Exist

The State says it is also immaterial that there is no "Amy Gimmets" and that the real nurse (Petryk) explained that Warren never provided the name "Kevin." The State notes that another nurse, John Foor, received the name "Kevin." But that is not true.

Foor's testimony is contradicted by Warren's medical records and by Warren himself. Foor was Warren's nurse until 7 a.m. on February 14, 1994, but Warren reported to hospital security at 1 p.m. that day that the shooter's name was "still unknown." Security Guard rpt., *Keith v. Mitchell*, 1:99-cv-00657, Dkt. 57-1. In other words, eight hours *after* Foor claims that Warren wrote "Kevin," Warren told security that he did not know the shooter's name.

Further, Foor claimed that Warren "wrote out" that he "felt the first name of the person was Kevin, that's all he knew." Tr. 778. Warren, however, testified that he did *not* write down the name "Kevin." Tr. 368.

Foor testified that he informed the Bucyrus Police Department about what Warren had written. Foor then testified that he threw the notes away since it "was just on a piece of scratch paper." *Id.* at 779. In April 2004, however, Keith discovered that scratch paper as a result of a public records request to the Bucyrus Police Department. While "Kevin" is indeed written down on the paper, it is written in a

handwriting different than the other handwritten words that are clearly attributable to Warren. Warren's handwriting is nearly illegible, and the words he wrote were haphazardly strewn across the pages (as opposed to writing from side-to-side). *See* Reply App. 1a. But "Kevin" is written clearly – and it is written in what appears to be the same handwriting as the words "Captain Stanley," "Bucyrus Police," and the phone number for the Bucyrus Police Department. *Id.* (page marked 0111).

These notes were part of the 2004 postconviction relief petition referenced by the State. Despite the fact that the Bucyrus Police possessed these notes, the State never bothered to correct Foor's testimony that they had been destroyed.

3. The remaining evidence against Keith is weak.

The new evidence is particularly material in light of the shaky remaining evidence. The State claims that the "police later discovered tire prints and a partial license plate imprint of "043" from the snow bank, and were able *to match* the vehicle to a 1982 Oldsmobile Omega, operated by Melanie Davidson, Keith's girlfriend." Opp. at 3 (emphasis added). This is an exaggeration.

A photograph of the 1982 Oldsmobile Omega was admitted into evidence at Keith's trial. Tr. 509-10. But Nancy Smathers, the eyewitness to the getaway car, never identified the picture of the Omega as the car she saw. *See* Tr. pp. 379-402. The car that she described to the police was "a light colored car, cream colored." Tr. 388. The Omega was described as green

or gray. Tr. 448, 509. Further, Smathers said she saw a *two door* car with *no moulding* and a back window that *went straight down to the trunk.* The Omega had four doors, moulding, and a the back window that slants down to the trunk.

Forensic expert G. Michelle Yezzo also did not match the car to the tire tracks at the scene. Yezzo compared "an enlargement [of the tire brochure] on the copy machine, the Triumph 2000 tire ... I found to be *similar in tread design* to the plaster cast and also to the photographs from the crime scene." Yezzo deposition, p. 14 (emphasis added). "Similar in tread design" is by no means a forensic match. And there was no testimony as to how many other tires would also be "similar in tread design."

The State has further relied on a bullet casing that was conveniently found "outside the entrance road of the local General Electric plant, where Keith had picked up another girlfriend from work on the night of the murders." Opp. at 3. The speculation was that the casing was inadvertently carried on the shooter's clothing away from the crime scene. Tr. 854. But Keith picked up his girlfriend at 11 p.m. that night, two hours after the murders. Tr. 410. Surely, the shooter would not still have been wearing the same clothing in which he shot up an apartment; even if he had, it is difficult to imagine how the casing could have been inadvertently carried on his clothing for that long.

CONCLUSION

The lower court did not properly consider the materiality of this new evidence, which could very well lead to Ohio's execution of the wrong man. Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX 1

Handwritten Notes
[000106-0000111]

[see fold-out exhibit, next 6 pages]

Attn: Capt Carver

Here are the papers Rick wrote in the intensive care ward. If you need anything else please call.

Pam Warren

317-322-3353 until 3:

5 pgs including Cover.

5-12-94 - @ 9.50 PM Philip

Philip Warren - Richard

Philip saw Richard @ Hospital Grant
Mon 14th approx 9AM. -

Had surgery - still had respirator
tubes in nose.

~~- asked Richard ---~~

- asked Richard if he knew who did
this & shook his head yes

- ~~Had~~ then wrote name Kevin on
paper.

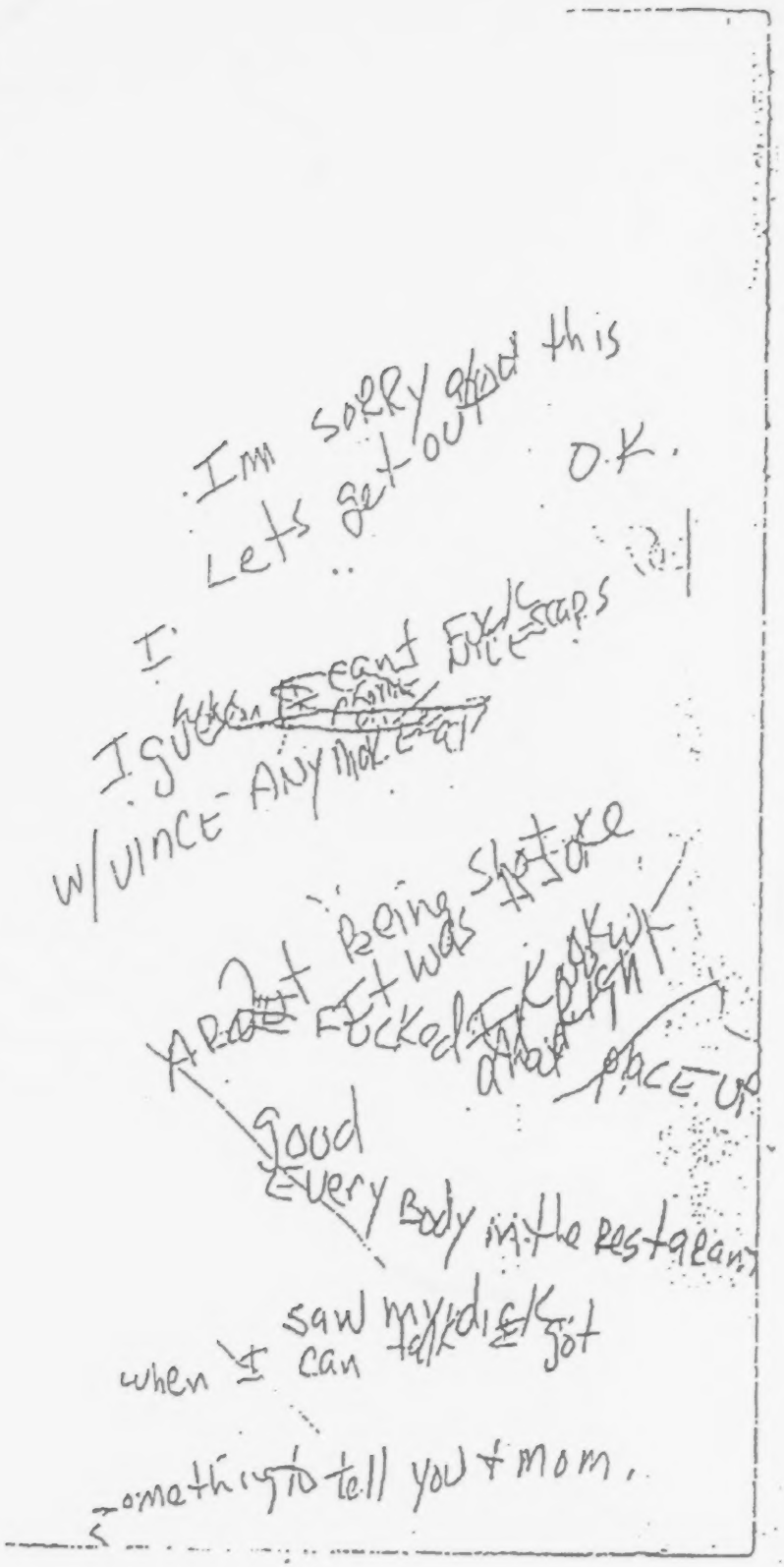
- asked if new last name
- shook his head no
- asked if he would know it if
heard it
- shook his head no

- Still have paper w/ Kevin on it

- Can Call wife @ 317 (work)
322-3353
"PAM" 8:30-4PM.
Home by 5PM. (6 my time)

~~FAX~~ FAX TO Police Dept.

BEST AVAILABLE COPY


Im sorry about this
Lets get out
O.K.
I
I guess
can't
w/ VINCE - ANY
2+ being
Shot
was
Good
Every Body in the restaurant
saw my
got
something to tell you + mom.

do it again

I think breathly
when are they gonna
will it hurt tim
like what

see
what is C-PAP
I feel like I'm
How does it's better
Breath
what can I say
w/out machine

THANX

Call the Police

I FEEL it HOT FOR JUSTICE

GSK IDFodt Sloop

IF it's OK

All Right my BROTHER

that this is too

my Left sid is Fucked up Tight

BSO Im ALRIGHT NOW

Capt. Stanley -

KEVIN -

DAMON - FRIEND

Eileen Can I Borrow your Typewriter Sometime

Bucyrus Police PD

419 - 562 - 1006

Supreme Court, U.S.
FILED
APR 5 - 2010
OFFICE OF THE CLERK

No. 09-1052

In the Supreme Court of the United States

KEVIN KEITH,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Third District

BRIEF FOR THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a death-sentenced defendant raises claims under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution suppressed evidence favorable to him, does a state court act contrary to this Court's precedents when it rejects those claims by relying on the sufficiency of the evidence presented at trial?

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The fifty-two current members of the Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[2] The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Innocence Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

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[1] The parties have consented to the filing of this brief. Their consent letters have been filed with the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The member entities are listed in the Appendix.

SUMMARY OF ARGUMENT

For nearly fifty years, this Court has recognized that a defendant's right to due process is infringed when a prosecutor withholds material evidence favorable to him. *See Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner Kevin Keith sought a new trial based on his discovery that the prosecution suppressed evidence implicating someone else in the murders for which he was sentenced to death. Keith also discovered that testimony bolstering key eyewitness testimony was false. Despite the weight of this evidence, and in direct conflict with this Court's precedents, the Ohio Court of Appeals denied Keith's *Brady* claim, holding that the newly uncovered evidence was not material because the evidence that was presented at trial was sufficient to support his conviction.

In applying a sufficiency of the evidence test to evaluate Keith's *Brady* claim, the Ohio Court of Appeals gave no consideration whatsoever to the nature and weight of the suppressed evidence. This approach directly conflicts with the long-standing analysis that this Court has emphasized is the correct approach to deciding *Brady* cases. Indeed, a sufficiency test, like that applied by the Ohio Court of Appeals, will never remedy a *Brady* violation, even in the most egregious cases of police and prosecutorial misconduct.

The Ohio Court of Appeals' wayward decision has implications beyond Keith's own case. Prosecutorial misconduct, whether intentional or not, is a major cause of wrongful convictions. And

courts, in faithfully applying the *Brady* doctrine, are often the last resort to remedy *Brady* violations. For that reason, courts must take seriously their obligations to evaluate *Brady* claims, and must apply the doctrine with vigilance and care. The Ohio Court of Appeals did not do so here. If left uncorrected, the Ohio Court of Appeals' decision risks working a substantial injustice, not only for Keith, but also for other wrongfully convicted prisoners who come before the Ohio courts.

REASONS FOR GRANTING THE WRIT

I. The Ohio Court of Appeals Incorrectly Applied A "Sufficiency Of The Evidence" Standard, Expressly Rejected By This Court, To Evaluate Petitioner's *Brady* Claim

This Court should grant Petitioner Keith's Petition for a Writ of Certiorari to preserve the integrity and faithful application of due process rights protected under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Under this well-established doctrine, the prosecution's suppression of material evidence favorable to an accused violates due process. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 669 (2004).[3] In *United States v. Bagley*, 473 U.S. 667, 682 (1985), this Court held that evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to

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[3] Suppression may occur even inadvertently, *Banks*, 540 U.S. at 691, and even without the prosecution's actual knowledge of the existence of the suppressed evidence. *Kyles v. Whitley*, 514 U.S. 419, 438–39 (1995).

the defense, the result of the proceeding would have been different." A "reasonable probability," this Court explained, is a probability "sufficient to undermine confidence in the outcome" of the trial. *Id.* The reasonable probability standard is not a more-likely-than-not standard; a defendant need not show by a preponderance of the evidence that he or she would have been acquitted had the evidence at issue been presented. *See Kyles*, 514 U.S. at 434 (citing *Bagley*, 473 U.S. at 682). And, when the suppressed evidence is false testimony, "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)).

This Court has emphasized that the materiality analysis under *Brady* is not a sufficiency of the evidence test. *Kyles*, 514 U.S. at 434. "A defendant need not demonstrate that after discounting the inculpatory evidence, there would have been enough left to convict." *Id.* at 434-35; *see also id.* at 435 n.8 ("This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of the evidence (or insufficiency) is the touchstone."). Rather, the test is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light so as to undermine confidence in the verdict." *Id.* at 435.

In this case, the Ohio Court of Appeals correctly stated the *Brady* materiality test, but it failed to apply that standard correctly. Instead, it stated only that the suppressed evidence was not

material because "[m]uch of the evidence was already presented at trial, if not directly at least inferentially. Furthermore, a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." Pet. App. 16a.

The Ohio Court of Appeals' cursory treatment of Keith's *Brady* claim demonstrates three critical errors that, if left to stand, may well result in the execution of an innocent man and the continued misapplication of *Brady* in Ohio. *First*, by stating that "much" of the evidence was presented at trial, it acknowledged that some of the evidence at issue was *not* presented at trial. Pet. App. 16a. Yet the court failed to identify that evidence or to evaluate whether its presentation would have affected the outcome of the case. This stands in contradiction to this Court's jurisprudence requiring *all* evidence be considered in evaluating a *Brady* claim. *See United States v. Agurs*, 427 U.S. 97, 112 (1976) (stating that the materiality of non-disclosed evidence "must be evaluated in the context of the entire record").

Second, when the Ohio Court of Appeals referred to evidence "inferentially" presented at trial, it confused evidence with inferences drawn from it. Pet. App. 16a. The court was likely referring here to defense counsel's suggestion at trial that Melton, not Keith, was responsible for the murders.[4] But evidence cannot be "inferentially" presented; it is

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[4] Some evidence admitted at trial supported defense counsel's argument that Melton was the murderer. *Infra* at 16–17.

either presented to a jury or it is not. The jury can make inferences only on the evidence actually presented. If it were otherwise, juries would be free to base a verdict on speculation, conjecture, and inferences based on evidence that was never admitted. Surely, a court cannot assume that a jury would shirk its duties in this way. But it is only by making such a cynical assumption that the Ohio Court of Appeals can ignore the fact that the evidence at issue here was never brought before the jury at all.

Third, the Ohio Court of Appeals supported its conclusion by asserting that "a jury of twelve citizens found the evidence presented sufficient to convict Keith." Pet. App. 16a. In doing so, it plainly relied on a sufficiency test, despite this Court's admonition in *Kyles* that the materiality inquiry "is not a sufficiency of evidence test." 514 U.S. at 434 But the sufficiency test employed by the Ohio Court of Appeals is even farther from the mark than the one rejected by this Court in *Kyles*. *Kyles* rejected a test that addressed whether there would have been sufficient inculpatory evidence if, hypothetically, the suppressed exculpatory evidence at issue had been introduced. *Id.* The Ohio Court of Appeals, deviating even more from this Court's precedents, considered the sufficiency only of the inculpatory evidence actually presented—even after acknowledging that some of the evidence at issue had not been presented at all. It is difficult to conceive how a court could more blithely disregard this Court's *Brady* jurisprudence. If uncorrected, the Ohio Court of Appeals, and possibly other Ohio courts, will continue to misapply *Brady*, potentially

resulting in upholding other wrongful convictions in Ohio.

II. Suppressed Evidence Will Never Be Material Under A Sufficiency of the Evidence Test, But Here, When The Suppressed Evidence Is Viewed As A Whole Consistent With This Court's Precedents, It Undermines Confidence In The Outcome Of Keith's Trial

A sufficiency of the evidence test, like that applied by the Ohio Court of Appeals here, will by definition fail to vindicate the important due process rights protected by *Brady*. The shortcomings of a sufficiency of the evidence analysis are particularly evident where, as here, the suppressed evidence includes compelling evidence of third-party guilt and evidence that the prosecution introduced false testimony to bolster inherently unreliable eyewitness identification.

A. A Sufficiency Test Inherently Fails To Take Into Consideration *Brady* Evidence Of Third-Party Guilt

By its very nature, a sufficiency of the evidence test, like the one applied by the Ohio Court of Appeals here, can never identify the due process violation that occurs when the police suppress evidence of third-party guilt. A sufficiency of the evidence test answers only the question whether the evidence presented at trial could have supported the jury's verdict. This question is irrelevant where, as here, the alleged constitutional harm concerns evidence that was never presented to the jury

because the state violated its constitutional duty to disclose it.

The failings of a sufficiency of the evidence test are even more egregious when the suppressed evidence is evidence of third-party guilt. Evidence that another person is responsible for a crime does not necessarily attack the sufficiency of the prosecution's case against an accused. Rather, third-party guilt evidence works to construct the defense's theory of the case by establishing innocence through authenticating the identity of the actual perpetrator. Considering only whether new evidence weakens evidence the prosecution put forward fails to give enough weight to the force of third-party guilt evidence. And the Ohio Court of Appeals did not even go this far: it held that the evidence actually presented at trial was sufficient to support Keith's conviction, without any regard whatsoever to the strength of the newly-disclosed third-party guilt evidence. [5]

Applying a sufficiency standard to examine *Brady* claims involving evidence of third-party guilt also fails to vindicate the due process rights this

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[5] This Court made this point in *House v. Bell*, 547 U.S. 518 (2006), where it considered an actual innocence claim based on new DNA evidence of third-party guilt. The Court explained that a sufficiency of the evidence test, like that employed in *Jackson v. Virginia*, 443 U.S. 307 (1979), is inappropriate where convictions are challenged on the basis of evidence that was not before the jury. *House*, 547 U.S. at 538. Instead such claims require courts "to assess how reasonable jurors would react to the overall, newly supplemented record." *Id.*

Court recognized in *Holmes v. South Carolina*, 547 U.S. 319 (2006). In *Holmes*, this Court overturned a state evidentiary rule that prohibited defendants from introducing evidence of third-party guilt where there is strong forensic evidence implicating the defendant. *Id.* at 331. The Court explained that a defendant has a right to present a complete defense, *id.* at 324, and that such a rule arbitrarily interfered with that right. *Id.* at 331.

In *Holmes*, this Court stressed that the probative value of evidence of third-party guilt cannot be evaluated solely by looking at the case put forth by the prosecution. *See id.* at 329-31. Similarly, in the *Brady* context, a court cannot vindicate a defendant's right to a complete defense by looking only to the strength of evidence actually introduced. But this is exactly what was done here by the Ohio Court of Appeals.

Moreover, the sufficiency analysis of the Ohio Court of Appeals undermines the central purpose of *Brady*: to ensure the fairness and integrity of the criminal process. In criminal trials, only the defense will present evidence of third-party guilt. And it is often the case that the defense must rely on the prosecution and the vast resources of the State to provide such evidence. Evidence uncovered during a police investigation that tends to implicate someone other than the defendant will most likely be found only in law enforcement's own files, and the authorities often have exclusive access to a crime scene and the evidence collected there. Similarly, law enforcement authorities often have exclusive or at least initial access to witnesses. By withholding

evidence discovered during investigations, the police can prevent the defense from establishing viable leads to other suspects. The *Brady* rule exists in part to remedy this imbalance of access. *See Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam) ("*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." (internal citations omitted)).

Furthermore, when evidence of third-party guilt is uncovered, and when such evidence might render the prosecution's case less compelling, prosecutors have a strong incentive to suppress such evidence, despite their duty to seek the truth and not simply convictions. Indeed, that is the central motivation behind the *Brady* rule. *See Strickler v. Greene*, 527 U.S. 263, 281 (1999) (noting that the *Brady* obligation stems from the American prosecutor's role as a representative of the impartial sovereign, not of an ordinary litigant). But, if courts reviewed *Brady* claims under the standard applied by the Ohio Court of Appeals here, they would fail to remedy serious due process violations, even in the most egregious cases of police and prosecutorial misconduct.

Thus, applying the proper *Brady* analysis is imperative, particularly in a case such as this one, where the suppressed evidence of third-party guilt is compelling. For that reason, this Court has insisted that the proper *Brady* materiality analysis depends on "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the

verdict." *Kyles*, 514 U.S. at 435. And for that reason, the Ohio Court of Appeals' analysis, if left to stand, will work a substantial injustice in this case and potentially future cases.

B. Consideration Of The Suppressed Evidence As A Whole Undermines Confidence In The Outcome of Keith's Trial

The suppressed evidence in this case includes three critical pieces of new evidence implicating Rodney Melton, not Petitioner Keith, in the murders. *First*, evidence from a file in a separate investigation shows that two weeks before the shooting, Melton stated that "he had been paid $15,000 to cripple the man who was responsible for the raids in Crestline, Ohio last week," referring to Rudel Chatman, the brother of victim Marichell Chatman. *Keith v. Bobby*, 551 F.3d 555, 560 561 (6th Cir. 2009) (Clay, J., dissenting). According to a witness report, before shooting his victims, the murderer complained about Rudel Chatman "ratting on people." *See* Pet. App. 10a. *Second*, police interview records show that Melton's accomplice in a pharmacy burglary ring told police that Melton had been paid to kill Chatman and threatened to kill anyone else who snitched on him, *Keith*, 551 F.3d at 561 (Clay, J., dissenting), a statement that is consistent with Melton's own statement. *Third*, additional undisclosed evidence in police files describes Melton's modus operandi of wearing a mask similar to that described by witnesses to the murders when he engaged in criminal activity. *Id.*

The new evidence also demonstrates that the police actively concealed from Keith evidence that Melton was the shooter. Two of the investigators who worked on Keith's case also participated in the interview with one of Melton's accomplices in the pharmacy robberies in which the accomplice described Melton's threats to kill those who snitched on him and Melton's boasts of having been paid to kill Chatman. *Id.*

Also suppressed in this case is evidence that the prosecution introduced false testimony to bolster the shaky eyewitness identification by Richard Warren, a surviving victim of the shooting, who identified Keith as the shooter after previously stating on several occasions that he could not see the masked shooter's face. *See id.* at 562 n.2. The jury heard from Captain John Stanley, who testified that he had received a call from "Amy Gimmets," purportedly the nurse attending to Warren. According to Stanley, "Amy Gimmets" told him that Warren said the first name of his assailant was "Kevin." The prosecution used this testimony to fend off the defense's challenges that the police improperly influenced Warren by supplying him with the name "Kevin." The prosecution also used this testimony to explain why the name array of potential suspects was limited to four individuals named "Kevin."

But new evidence shows that "Amy Gimmets" never existed. There are no records of an "Amy Gimmets" ever being employed by the hospital that treated Warren. In fact, no one by that name is licensed as a nurse in the State of Ohio. *See*

Defendant's New Trial Motion Exh. 5. And the discrepancy is not a simple typographical error; Amy Whisman (now Amy Petryk), the nurse who actually attended to Warren,[6] has filed an affidavit stating that Warren never identified "Kevin" as the shooter and that she never told Captain Stanley that he did. *See* Defendant's New Trial Motion Exh. 4. In other words, new evidence confirms that Captain Stanley's testimony that "Amy Gimmets" told him that Warren had identified "Kevin" as the shooter was false.

There is no excuse for the prosecution's endorsement of Captain Stanley's false testimony or its failure to disclose evidence that no "Amy Gimmets" actually existed. As this Court made clear in *Napue*, the Fourteenth Amendment forbids a prosecutor from knowingly soliciting false testimony or allowing it to go uncorrected. 360 U.S. at 269. The nonexistence of "Amy Gimmets" should have been known and disclosed by the prosecution, *see Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."), but it was uncovered by the defense only after the prosecution had secured Keith's conviction. This evidence alone would have affected the outcome of the trial.

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[6] Captain Stanley's police report states that he spoke with nurse Amy Whisman. *See* Defendant's New Trial Motion Exh. 10.

The Ohio Court of Appeals, however, never considered whether there is a reasonable probability that the suppressed evidence would have affected the outcome of the trial, as this Court requires for evaluating the materiality of *Brady* evidence. *Kyles*, 514 U.S. at 434-35. Nor did the court consider whether there is "any reasonable likelihood" that Captain Stanley's false testimony would have affected the judgment of the jury, as this Court has instructed courts to do when evaluating the effect of false testimony. *See Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). Instead, the court ignored this Court's well-established guidelines, denying Keith's claims because the evidence actually introduced at trial was sufficient to support conviction.[7]

Had the Ohio Court considered the suppressed evidence in light of the evidence as a whole, as this Court's precedent requires it to do, it would have

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[7] The only discussion by the Ohio Court of Appeals of the suppressed evidence relating to "Amy Gimmets" is its reasoning that Keith's claim is barred by res judicata because it should have come out at trial or on direct appeal that no "Amy Gimmets" actually exists. But this reasoning turns a criminal prosecution on its head. Indeed, the court's reasoning is akin to holding that Keith's claims are barred because he found out too late in the game that testimony was false. No matter the circumstances, a capital murder conviction and sentence cannot stand when based on false testimony. The obligation to correct the record rests with the State, not Keith. *See Banks*, 540 U.S. at 675-76 ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.").

concluded that the government's suppression of evidence undermined its confidence in the outcome of the trial. *See Kyles*, 514 U.S. at 435. The suppressed evidence bolsters the argument that Melton was the shooter, reinforcing evidence introduced at trial showing that: (1) the partial license plate numbers imprinted in a snow bank matched the license plate on Melton's car; (2) Melton owned and drove a light yellow Chevy Impala, which matched a witness's description of a "real light" colored car; (3) defense counsel had been contacted by one of Melton's relatives who stated that Melton was "in on the killings"; (4) Melton appeared at the crime scene knowing the type of bullets used in the shootings; (5) Melton, without being asked, created an alibi for himself by telling the police at the crime scene that his car—a car that matched the witness's description—was broken down that night; and (6) Chatman's daughter told police that she had been shot by "her daddy's friend Bruce"—Melton's brother is named Bruce and was also Chatman's friend.

It is reasonably likely that if the jurors had known also of Melton's multiple threats against Chatman and Melton's modus operandi of wearing a mask when committing a crime, coupled with the above evidence, they would not have discounted the totality of evidence pointing to Melton—and away from Keith. In short, had the Ohio Appellate Court asked the correct question, it would have concluded that the suppression of this evidence undermines confidence in the outcome of the trial.

Moreover, if the Ohio Court of Appeals had applied the correct analysis, it also would have

concluded that the suppression of this evidence combined with the false testimony of Captain Stanley seriously undermines confidence in the trial verdict. The suppressed evidence, had it been disclosed, would have flatly contradicted Captain Stanley's testimony that he first heard the name "Kevin" from the nurse attending to Warren. Or, in light of the impeachment value of the evidence, the prosecution might not have called Captain Stanley as a witness at all. In either case, the jury would have been left with only Warren's beleaguered witness identification of Keith, weakened by three key facts: (i) Warren initially told four different witnesses that he did not know who had shot him; (ii) the assailant was wearing a mask that covered much of his face; and (iii) it was the police that suggested the name "Kevin" to Warren. *See Keith*, 551 F.3d at 562 n.2 (Clay, J., dissenting).

The Ohio Court of Appeals' analysis thus illustrates how a sufficiency of the evidence standard will routinely fail to vindicate a defendant's due process rights under *Brady* where the excluded evidence undermines eyewitness testimony. First, as courts themselves have widely recognized, witness identification testimony is both powerful and inherently unreliable. *See, e.g., Towers v. Smith*, 395 F.3d 251, 260 (6th Cir. 2005) ("We have repeatedly expressed our 'grave reservations concerning the reliability of eyewitness testimony.'") (internal citation omitted); *see also* Brief of Memory Experts as Amici Curiae in Support of Petitioner. In light of the inherent concerns surrounding the use of eyewitness testimony, additional evidence bearing on its veracity is all the more important.

Critically, applying a sufficiency of the evidence standard will systematically fail to properly assess the effect of suppressed evidence bearing on the veracity of eyewitness identification testimony, and for a simple reason: a sufficiency analysis, like that conducted by the Ohio Court of Appeals here, does not ask the court to reevaluate the weight of the witness identification testimony in light of the suppressed evidence.

III. The Proper Application Of *Brady* Has Critical Implications For Exonerating The Wrongfully Accused

A. A Sufficiency of the Evidence Test Has Similarly Failed To Detect *Brady* Violations In Other Capital Cases Where Prisoners Were Later Exonerated

Courts that have applied a sufficiency analysis like that applied by the Ohio Court of Appeals have failed to properly detect *Brady* violations, as exonerations in these cases later vindicated the defendants' original claims.

For example, Calvin Washington was convicted of capital murder and sentenced to life in prison. *Washington v. State of Texas*, 822 S.W.2d 110 (Tex. Ct. App. 1991). He raised several *Brady* claims after his lawyer was allowed to inspect the prosecution's file on appeal. *Id.* at 121. The files contained an interview with a fellow inmate revealing that a state's witness had admitted that

Washington "wasn't the one," that a state investigator who had testified at Washington's trial was known to cut deals with inmates, and other impeachment and potentially exculpatory evidence. *Id.* They also contained the notes of a police investigator (who later also testified) containing exculpatory and impeachment leads, including a change of jail record benefiting a State's witness and testimony about the location of the victim's car. *Id.*

Nevertheless, the Texas court held that because the state's witnesses were cross-examined—despite the fact that defense counsel did not have key impeachment and exculpatory information—it did not "believe" "disclosure of further information of the nature described by Appellant would have created a reasonable doubt" and upheld the conviction. *Id.* at 122. The court failed to analyze whether the new evidence would have undermined confidence in the jury's verdict. Washington served another ten years before DNA testing exonerated him. *See* The Innocence Project - Profiles: Calvin Washington, http://www.innocenceproject.org/Content/283.php (last visited Apr. 2, 2010).

A similar misapplication of a sufficiency test to evidence never presented occurred in the case of Anthony Porter, who was convicted for a double homicide and sentenced to death. *People v. Porter*, 647 N.E.2d 972, 973–74 (Ill. 1995). Because of Porter's counsel's inadequate investigation, the jury never heard compelling testimony that another man, Alstory Simon, was guilty of the murders. One witness would have testified that the victims walked to the scene of the murders with Simon and that

Simon threatened the witness when she asked what had happened there. *Id.* Another witness would have testified that one of the victims had been selling drugs for Simon and that there was considerable animosity between Simon and that victim. *Id.* at 974.

In denying Porter's claim for ineffective assistance of counsel, the Illinois court held that the failure to present that testimony was not prejudicial because the evidence that was presented at trial "was considerable." *Id.* at 975.[8] Applying the same improper logic as the Ohio court in Keith's case, the Illinois court reasoned that the unpresented evidence "would simply echo" the alibi that the jury had heard in testimony that defense counsel did present and must have rejected. *Id.* Porter was exonerated several years later after: Simon confessed on videotape; a witness for the state recanted his testimony and stated that the police had pressured him to name Porter; and Simon's ex-wife's stated that that she had been present when Simon shot the victims and that Porter had nothing to do with the crime. *See* Northwestern Law Bluhm Legal Clinic, Center On Wrongful Convictions:

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[8] The prejudice standard under *Strickland v. Washington*, 466 U.S. 668 (1984), is the same as the materiality standard under *Brady*. *See Strickland*, 466 U.S. at 694 ("[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Anthony Porter, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilPorterSummary.html (last visited Apr. 2, 2010).

In both cases, as in Keith's, a court improperly reasoned that because evidence presented to the jury was sufficient to support its verdict, testimony the jury never heard could not have affected the trial. This formulation strips the materiality analysis of meaning and resulted in courts upholding wrongful convictions.

B. The Proper Application Of *Brady* Is Critical To Securing New Trials For The Wrongfully Convicted

Brady has been essential in ensuring that prosecutors do not abuse their immense power to secure convictions and in overturning convictions of those who were wrongfully convicted because they were denied favorable evidence to support their defense. It has long been the case that "[t]he prosecutor has more power over life, liberty, and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor, Address Before Second Annual Conference of U.S. Attorneys (Apr. 1, 1940)*, 31 J. Am. Inst. Crim. L. & Criminology 3 (1940). The men and women who are charged with this power exercise it under substantial pressure—from supervisors, the media, and voters—to win convictions. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399, 405 (2006) (discussing societal and electoral pressures); Jeffrey

Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Calif. L. Rev. 1471, 1474 n.7 (1993) (discussing pressure from prosecutors' supervisors, as well as prosecutors' own determination to win); Paul R. Wallace, *Prosecuting in the Limelight*, 22 Del. Law. 20, 21 (2005) (discussing media pressures).

This pressure works on prosecutors in often subtle psychological ways, leading to the suppression of *Brady* evidence even by ethical prosecutors. Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 Ind. L. J. 481, 495 (2009) (identifying selective perception and cognitive dissonance as causes for suppression of evidence). In other cases, prosecutors react to these pressures by deliberately suppressing evidence in order to win a conviction. *E.g.*, *Pyle v. Kansas*, 317 U.S. 213, 215 (1942). [9]

Unfortunately, the system provides few tools to detect, correct, and prevent prosecutorial misconduct. *See* Joy, *supra* at 425–26 (noting the infrequency with which prosecutors face internal or external discipline for misconduct). This deficiency renders *Brady* all the more valuable: the courts assume a prominent role in deterring prosecutorial

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[9] The costs of prosecutorial misconduct are not borne by the defendant alone. Misconduct deprives juries of the ability to determine the defendant's guilt or innocence without access to all of the facts that it needs to do so fairly. It results in verdicts not deserving of confidence, *see Bagley*, 473 U.S. at 682, damaging the legal system as a whole and the society that depends upon its integrity. The public also faces an immediate harm in the risk that, by putting an innocent person behind bars, the actual perpetrator escapes with impunity.

misconduct and remedying its effects. For that reason, courts must apply *Brady* with diligence and care. The Ohio Court of Appeals failed to take that obligation seriously, at great cost to both Keith and the integrity of the criminal justice system. If left undisturbed, its decision risks working a substantial injustice, not just for Keith, but also for other wrongfully convicted prisoners who may come before the Ohio courts in the future.

IV. This Court Should Grant Certiorari To Prevent Substantial Injustice.

As this Court has repeatedly noted, *Brady* violations are matters of Constitutional concern that implicate the right to a fair trial and the state's obligation to ensure that justice be done:

> The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure "that justice shall be done" in all criminal prosecutions. In *Brady v. Maryland*, we held that when a State suppresses evidence favorable to an accused that is material to guilt or to punishment, the State violates the defendant's right to due process, "irrespective of the good faith or bad faith of the prosecution."

Cone v. Bell, 129 S. Ct. 1769, 1772 (2009) (internal citations omitted). Proper analysis of *Brady* claims

and application of this Court's *Brady* jurisprudence are thus essential to prevent fundamental injustice: "The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675.

Cases such as Kevin Keith's, where "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," "involve a corruption of the truth-seeking function of the trial process" and are "fundamentally unfair." *Agurs*, 427 U.S. at 103-04. Such "'a deliberate deception of court and jury by the presentation of testimony known to be perjured' is inconsistent with 'the rudimentary demands of justice.'" *Bagley*, 473 U.S. at 680 n.8 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

As *Brady* itself makes clear, this Court's intervention in Keith's case is necessary to preserve confidence in the larger criminal justice system:

> The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would

> tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Brady, 373 U.S. at 87-88.

Kevin Keith's petition is not simply about a court's factual error. It is about a fundamental legal error in the Ohio Appellate Court's decision to apply a standard that this Court has expressly held, and indeed emphasized, should not be used to evaluate *Brady* claims. Members of this Court have indicated that in capital cases such as the instant one, even where the legal issues presented may not be novel, it is important for this Court to grant certiorari to ensure the correct application of the law. *See Kyles*, 514 U.S. at 455 (Stevens, J., concurring) ("Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law."). Having failed to properly evaluate Keith's *Brady* claims, the Ohio courts have thereby failed to fulfill the purpose of *Brady*: to ensure that justice is done.

Accordingly, the Ohio Court of Appeals' decision, if left to stand, will result in real and substantial injustice. The suppressed evidence both implicates someone else in the murders and undermines the key testimony against Keith. A proper application of the standard governing *Brady*

claims would have shown that the suppressed evidence sheds serious doubt on whether the right man stands convicted of the crime and undermines any confidence in Keith's trial. Without the intervention of this Court, a man whom the state has deprived of a fair trial will be put to death by that same state. Having no reasonable certainty in the reliability of Keith's trial, this Court should grant certiorari to prevent this injustice before he receives the ultimate, irreversible punishment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 5, 2010

APPENDIX

APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in Defence of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Griffith University Innocence Project (Australia), Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project at UVA School of Law, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina

Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post Conviction Project (New York), Palmetto Innocence Project, Pennsylvania Innocence Project, Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), The Sellenger Centre (Australia), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wesleyan Innocence Project, and the Wisconsin Innocence Project.

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No. 09-1052 CAPITAL CASE

Supreme Court of the United States

KEVIN KEITH,

Petitioner

v.

STATE OF OHIO,

Respondent

BRIEF OF MEMORY EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF MEMORY EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICI CURIAE*

This *Amicus Curiae* brief is submitted on behalf of 13 current and former professors of psychology who are experts on memory and eyewitness identification. *Amici* teach, research and write about memory as evidence as applied by the state and federal courts of the United States. As experts on memory and eyewitness identification, they have a strong professional interest in the issues presented by this case. Further, they have particular insight into the degree to which faulty eyewitness evidence may have unfairly prejudiced the outcome of Kevin Keith's capital murder trial.

The *Amici* on whose behalf this brief is submitted are:

1. Dr. Scott D. Gronlund, Roger and Sherry Teigen Presidential Professor of Psychology, University of Oklahoma, Norman, OK
2. Dr. Daniel L. Schacter, William R. Kenan, Jr. Professor of Psychology, Harvard University, Cambridge, MA

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[1] No counsel for a party authored this brief in whole or in part. Counsel for the Petitioner paid for the copying and mailing of this brief. No other monetary contributions have been made by any person. Rachel Troutman, attorney for Mr. Keith, consented to the filing of this brief. Matthew Kanai, Senior Assistant Attorney General, consented to the filing of this brief.

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SUMMARY OF ARGUMENT

No one can determine, without independent corroboration, whether an eyewitness has correctly identified the perpetrator of the crime or has misidentified an innocent person. Eyewitness identification experts are no exception. However, the scientific study of memory has identified risk factors that increase the likelihood of mistaken identification and undermine the probative value of identification evidence. Many of these risk factors were present in the case against Kevin Keith.

- Richard Warren's description of the perpetrator was vague due to extreme stress, weapon focus, and the

perpetrator obscuring the bottom half of his face with a turtleneck. Nancy Smathers only viewed a man fleeing the scene from a distance and encoded only the grossest (general) characteristics about this man.

- The police presented the last name Keith to Richard Warren.
- Nancy Smathers selected Kevin Keith from the lineup only after viewing him on TV. This identification had great prejudicial value and no probative value.
- The lineup was highly biased toward Kevin Keith. Over 75% of individuals with no memory for the crime select Kevin Keith as the individual in the lineup that most resembles the description.
- Quanita Reeves indicated that although #5 (Kevin Keith) resembled the perpetrator, he was not the perpetrator. Quanita Reeves' nonidentification provided evidence in favor of Kevin Keith's innocence.

ARGUMENT

I. Limitations of the scientific investigation of eyewitness identification

Physical evidence like fingerprints or blood samples can be tested and retested without changes to that evidence, but eyewitness evidence exists only in the mind (memory) of the witness. This unique nature necessitates an emphasis on the methods used to extract what is in a witness' memory. Moreover, every time a witness' memory is tested, the memory evidence can be changed by the context of the retrieval attempt (e.g., a biased procedure, being pressed for details by another detective, describing the events to a friend). Memory is very malleable and highly reconstructive (e.g., Loftus, 1997; Schacter, 2002). As evidence, it must be evaluated very carefully. Despite that, it is among the most convincing evidence to a jury (Brigham & Bothwell, 1983). In the words of former Supreme Court Justice William J.

Brennan, there is "nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" These eyewitnesses are not lying, but their memory can easily trick them.

The advent of DNA testing has revealed that faulty eyewitness identification is the single most likely factor to result in wrongful conviction. Of course, that fact not only means that the life of an innocent man is destroyed but it also means that the life of the guilty man continues unimpeded. The scientific literature investigating eyewitness identification consists largely of laboratory-based studies involving mock crimes presented on video. This obviously differs in *many* ways from what a witness experiences during an actual crime. However, it is wrong to dismiss this research because it does not involve real crimes or because it only involves college students. The control of the laboratory allows causal factors to be isolated from extraneous ones to reveal how memory operates. This is the goal of the scientific investigation of memory. Psychology researchers conduct laboratory-based studies because it would be unethical to expose participants to actual violence. When opportunities for more realistic depictions are available, the results are similar regarding the poor accuracy of eyewitness identifications. For example, the participants in a study by Morgan et al. (2004) were soldiers undergoing prisoner-of-war training. The soldiers were subjected to low-stress or high-stress interrogations. Despite interacting with their interrogators for more than 30 minutes, the soldiers had great difficulty subsequently identifying their interrogator from a photo lineup. For the soldiers subjected to the low-stress interrogation, they correctly selected their interrogator 76% of the time when he was in the photo lineup, but falsely selected an innocent man 38% of the time. For those subjected to the high-stress interrogation, accuracy was much poorer. The correct identification rate dropped to 34% and the false identification rate rose to 68%.

II. Theoretical framework for understanding memory

The 251 exonerated individuals reported by the Innocence Project are testament to the fact that eyewitnesses make mistakes. Importantly, the primary evidence leading to more than 75% of these wrongful convictions was faulty eyewitness identification. But it is critical to note that these eyewitnesses were not lying. In fact, their memory tricked them. By reviewing how our memory operates, we will see how these errors can arise, and how they fool us despite an eyewitness' best efforts to be careful, precise, and accurate.

Memory for a past event is dependent on three phases: encoding, maintenance and retrieval. Although these phases are relevant to any memory situation, we will illustrate these phases by first describing how they apply to a generic eyewitness identification situation and then how they apply to the Kevin Keith case.

A. Phase I-Encoding. The first phase of any memory situation involves the encoding of an event. In the case of a crime, the events to be encoded include the face of the perpetrator, a description (face, clothing, gait, voice, etc.), the weapon, plus other relevant details (e.g., where the crime took place, who else was present).

There is an overabundance of information available in every situation. We cannot encode everything due to limitations on our cognitive capacity (Engle, Kane, & Tuholski, 1999; Miller, 1956). Anyone who has ever sat behind someone at a green light while the driver in front happily chats on the cell phone is aware of these limitations. Heightened stress can reduce the availability capacity that we have, which can harm memory. The Morgan et al. (2004) study reported above illustrated that high stress has a very strong and negative impact on eyewitness identification accuracy. A meta-analysis by Deffenbacher et al (2004) examined 30 years of research on the effect of stress on the fidelity of eyewitness

memory. Across 27 different empirical tests, these authors found support for the hypothesis that "high levels of stress negatively impact...eyewitness memory."

Another indication of the relationship between our limited cognitive capacity and memory involves the weapon-focus effect. The weapon-focus effect demonstrates that when a perpetrator is observed with a weapon, a witness's attention is drawn to the weapon and away from the person carrying that weapon (Loftus, Loftus, & Messo, 1987; see Steblay, 1992, for a review of this literature). Because our cognitive capacity is limited, if someone is paying attention to a weapon, that means that they have taken attention away from other aspects of the event. That means that details about the perpetrator are not being encoded. However, weapon-focus effects may be smaller if the witness sees the perpetrator both with, and without, the weapon.

Knowledge and experience influence what we encode. For example, cross-race identifications are less accurate than same race identifications. Meissner and Brigham (2001) collected every cross-race study ever conducted to demonstrate the robustness of the cross-race deficit. Although many explanations have been offered for the cross-race bias, and no single explanation may be sufficient, one contributing factor might be that a lack of experience with individuals of a different race influences what features an eyewitness encodes about a perpetrator (e.g., Malpass & Kravitz, 1969; Platz & Hosch, 1988).

We can only remember what we have encoded. That means that information that is *not* encoded is *not* in memory and therefore *cannot* be remembered. Moreover, the accuracy of eyewitness identification is reduced if the perpetrator wears a disguise or hides his or her appearance by wearing a hat (Cutler, Penrod, & Martens, 1987) or sunglasses (Hockley, Hemsworth, & Consoli, 1999). Unfortunately, other mechanisms can operate to make an eyewitness "remember"

something that they never encoded. Therefore, it important to distinguish between information retrieved from memory because it was actually experienced versus information that is reconstructed and incorrectly reported as a memory. Unfortunately, this is a distinction that people have difficulty making. In normal day-to-day life, it matters little if someone is confused whether a friend stated that President Bush had a shoe thrown at him, they saw it on TV, or read about in the paper. But we have a dilemma when an eyewitness is unable to ascertain whether the person they selected from a lineup was selected because the witness saw the accused on TV or because the person selected from the lineup was the person that shot the victim.

B. Phase II-Maintenance. The second phase of this memory framework involves the maintenance of an encoded event during a retention interval. Two primary changes can happen to an event during the period between encoding and retrieval. One is that the encoded event weakens: Memory does NOT get better with time. The decreasing strength of a memory representation is well summarized by an exponential decay or power function (Wixted & Ebbesen, 1991). What that function shows is that information about an event is lost very quickly at first (a steep downward decline). Over time this rate of information loss slows.

The other change that can occur during maintenance is that the memory for an original event can be modified. A suggestion by another witness, the police, or the media, or an inference made by the witness, can modify or influence memory for an existing event (Schacter, 1999, 2002). For example, a witness might misremember that the perpetrator was wearing a Cleveland Cavaliers cap upon overhearing that reported by another witness. There are countless studies that demonstrate this phenomenon (e.g., Loftus, 1997; Loftus & Ketcham, 1994; Loftus & Palmer, 1974). The consequences of this phenomenon for retrieval will be discussed next.

C. Phase III-Retrieval. Events or details that never happened during a crime can be reported as memories. As mentioned above, these faux events or details can enter the memory system during the encoding or maintenance phases as a result of hearing about a detail on TV, being told something by the police or another witness, or by the witness him or herself making an inference about what happened. An eyewitness then makes this piece of added information part of his or her narrative about the event in question.

This process is a natural result of the way our memory works: People have poor memory for the source of a given memory (Mitchell & Johnson, 2000). This happens for at least two reasons. One, it is cognitively expensive to encode information about the source of a memory, and as was indicated above, people have limited cognitive capacity (e.g., Engle et al., 1999). A second reason is that the source of a memory is seldom relevant. Consequently, our memory system has not evolved to readily encode source information. For example, it is not important that a juror remember whether she learned that the perpetrator's fingerprints were on the knife from the FBI agent, the police officer, or from the DA's closing arguments. What matters is that she knows it to be true.

Current theory posits two mechanisms that underlie the memory decisions we make: familiarity and recollection (Clark & Gronlund, 1996; Yonelinas, 2002). Familiarity is an undifferentiated feeling that an event or detail has been experienced before (Mandler, 1980). Imagine that you see a familiar face at the mall but can't remember the name or from where you know the person. They are familiar but you cannot recollect the details. Recollection is required to retrieve the source of a memory (Yonelinas, 1999), which might allow you remember that this person works in your building. Recollection (often referred to as recall) involves the extraction from memory of a specific detail attached to the memory being sought that provides its source (that's

Christine because she wore that same red sweater at work last week).

Familiarity is an effortless and automatic process (Jacoby, 1991). That means that it requires no cognitive capacity and it is obligatory (we can't help but assess the familiarity of the things in our environment). Recollection, on the other hand, is effortful and under strategic control. That means that it consumes cognitive capacity and is optional. As a result of the operation of these mechanisms, certain events related to the crime or the perpetrator can be familiar to a witness without the witness being able to distinguish between those events or details that he or she actually experienced and those events or details suggested by the media, the police, or their own thought processes. The problem with eyewitness identification evidence is that we are asking our memory system to do something that it is ill-equipped to do.

The most important factor affecting the retrieval phase in an eyewitness situation is the lineup. The lineup is akin to a multiple-choice test except that the correct answer is not necessarily present. In psychology, signal detection theory provides the framework for understanding these situations (Swets, 1964). Signal detection theory distinguishes between sensitivity and bias. Sensitivity is determined by the quality of an eyewitness' memory. If the eyewitness encoded many details about the perpetrator and if the retention interval is short, sensitivity (the ability of a witness to correctly select the guilty suspect from a lineup) should be high. If the witness encoded few details or there is a long delay between the crime and the lineup, sensitivity is poor. Bias refers to an eyewitness' willingness to make a choice. One witness may believe that his job is to select someone from the lineup, no matter what. Another witness may be more conservative and be unwilling to choose anyone unless she is certain that this individual is the perpetrator. A lineup administrator also can influence the willingness of a witness to choose given the

instructions or prompts that they give to the witness (Clark, 2005; Clark, Marshall, & Rosenthal, 2009).

The fairness of a lineup can affect both sensitivity and bias (Lindsay & Wells, 1980). The criminal justice system learns little when a suspect is selected from a biased lineup in which the suspect stands out from the other lineup members (i.e., the suspect is the only individual in the lineup who matches the description). A biased lineup also can enhance the willingness of an eyewitness to make a choice, as well as enhance the confidence of an eyewitness in that choice. Eyewitness' confidence, as well as other aspects of an eyewitness' memory (e.g., how good a look they report getting of the perpetrator), is inflated by any confirming feedback they receive about the choice they made (Bradfield, Wells, & Olson, 2002).

A final factor to consider is the grain size of the memory that is reported (Goldsmith, Koriat, & Pansky, 2005). Grain size refers to a memory's level of precision. People tend to adjust the grain size of what they report to maximize the accuracy of that report. Therefore, another source of inaccuracy arises when the police request a more detailed grain size than what a witness has available. For example, an eyewitness might report that the perpetrator was a big, fat guy. If that is all the eyewitness can remember, investigators that press for more precise answers risk getting inaccurate information. Granted, 6'3" and 275 lbs. is more precise, and therefore might be deemed more helpful to the police. However, this would not be the case if the "big, fat guy" was actually 5'10" (which is still a lot taller than a 4'11" eyewitness).

III. Application to the Kevin Keith case

We now have set the foundation of peer-reviewed scientific research so that we can comment on the eyewitness identification issues as they relate to the Kevin Keith case. In particular, we will view the eyewitness evidence bearing on

this case through the lens of the encoding, maintenance and retrieval framework laid out above.

Nancy Smathers and Richard Warren were the primary eyewitnesses and we primarily will deal with them. Nancy Smathers possessed circumstantial evidence regarding the perpetrator's identity. She observed someone, believed to be the perpetrator, fleeing the scene of the crime. Richard Warren possessed direct evidence regarding the perpetrator. He was present during the commission of the crime.

According to our reading of the evidence, the primary factors to consider are:

- The relatively vague initial description of the perpetrator by both primary witnesses
- Issues surrounding the first and last name of the perpetrator (involving Richard Warren)
- The lineup

Note that the first factor relates to the encoding phase, the next relates to the maintenance phase, and the final factor relates to the retrieval phase.

A. Encoding of the perpetrator. Both Smathers and Warren report vague descriptions of the perpetrator (e.g., big fat guy, could recognize by his build). This is not surprising for Smathers given that she was some distance from the person who fled the crime scene (probably the perpetrator). Although this individual did get his car stuck in the snow bank for an extended period of time, the lack of a dome light in the car and the generally poor illumination and distance from Smathers to this incident provided little opportunity to encode details about the individual driving the car.

Somewhat surprisingly, Warren's description also was vague, despite Warren having viewed and talked with the perpetrator in advance of the crime (before any weapon was present). Why was that? Upon first encountering the perpetrator,

Warren reported watching a basketball game on TV. During this time, Warren's attention was focused on the basketball game and not on the perpetrator. Due to our limited cognitive capacity, attention directed at the basketball game was attention NOT directed at encoding the perpetrator. Also, Warren reported that the bottom half of the perpetrator's face was covered by a shirt or turtleneck (Tr. 348). Clearly one cannot encode what one cannot see: Disguises harm memory (Cutler et al., 1987; Hockley et al., 1999). The next problem was that once the situation escalated, Warren's stress level increased substantially at exactly the time that Warren was giving his full attention to the perpetrator. As reported by Deffenbacher et al. (2004), heightened stress adversely affects memory. There was a weapon involved, which naturally becomes the focus of attention and a priority perceptually (weapon focus, Steblay et al., 1992). In other words, the weapon serves as a visual magnet; it is more important for one's survival to look at the weapon. Warren provided a very detailed description of that weapon (pp. 11-13 of Warren's statement to the police), which is an indication of where his attention was during this stage of the crime. Again, due to our limited cognitive capacity, attention directed at the gun is attention NOT directed at encoding the perpetrator. Finally, the perpetrator was black and Warren is white so this was a cross-race identification. A cross-race identification is slightly more difficult than a same-race identification (Meissner & Brigham, 2001).

All these aforementioned factors contributed to Warren having a poor encoding of the perpetrator. Warren reported (Tr. 352) that he only could recognize the perpetrator by his build and size. Warren probably acted appropriately regarding his initial reports to the police of what the perpetrator looked like; adjusting his grain size so that the report he gave was accurate (albeit vague: big fat black guy). Unfortunately, that was about all that Warren (and Smathers) encoded about the perpetrator.

In sum, the poor initial encoding of the perpetrator by both Smathers and Warren did not bode well for the validity of subsequent eyewitness identifications.

B. Name of the perpetrator. There appears to be some controversy regarding where Warren got the name of the perpetrator. In his testimony, Warren reported that Marichell (one of the children) referred to the perpetrator as Kevin several times during the crime (e.g., Tr. 338). However, it seemed surprising that Warren failed to report the name Kevin to the patrons at Ike's restaurant as he chased the perpetrator or to the police at the scene. Moreover, Captain Stanley reported that the nurse from the hospital where Warren's gunshots wounds were treated told him the name Kevin, but Nurse Amy Petryk denied that in her affidavit. Warren subsequently reported being unable to recall whether he mentioned the name to the police or they mentioned it to him (Tr. 372).

Kevin Keith's name was prominent with the police as a possible suspect. In Warren's psychological evaluation, the doctor reported that Warren reported that "law enforcement theorized that shooting may have been drug related involving Marcel's brother." Linda Chatman also had told Warren that someone named Kevin involved in a drug bust was the same size as the perpetrator (Tr. 369). As a result of these connections, Keith was one of the names the police presented to Warren while Warren was in the hospital. If the police suspected Kevin Keith from the start, they would fail to consider other possible suspects. Chief of Police James Smith (Crestline) told Capt. Stanley of two Kevins that fit the description, Kevin Keith and Kevin Thomas. Kevin Thomas was considered a suspect by Captain Stanley (Tr. 220). But when Capt. Stanley instructed Officer Koepke to make the photo lineup, he told Koepke to include Kevin Keith but not to include Kevin Thomas (Tr. 225).

In sum, police considered only Kevin Keith as a suspect, resulting in his photo being the only suspect ever placed into a lineup.

Our expertise does not lie in the domain of trying to sort out the issue about how the name Kevin became connected to the perpetrator. However, we can consider what could have happened to Warren's memory if the police provided him with the name Kevin. Warren could have incorporated that information into his own memory due to poor monitoring of the source of the memory (Mitchell & Johnson, 2000). Furthermore, people often rely on familiarity to make a determination about whether an event occurred, or to determine if they previously had seen a particular person. Once Warren heard the name Kevin, the name can become part of Warren's memory even if the police suggested it to him.

There is no question that the last name, Keith, was provided to Warren. While recovering in the hospital, the police told Warren 4 to 5 last names because Warren signaled that he might recognize the last name if he heard it again. Upon hearing Keith, Warren reported that he was 75% sure that Keith was the last name. Unfortunately, what he might have meant was that the last name Keith was *familiar* to him but for reasons other than the crime at Bucyrus Estates. After all, given the relationship between Linda Chatman, her brothers Rudel and Dameon, and Kevin Keith (as a result of an earlier drug bust), it is possible that Warren previously had heard the name Kevin Keith in another context. If that was the case, it would be difficult for Warren to keep track of from where the name was familiar. Therefore, just because Keith's name was familiar does not mean that Keith was the name that Warren reported hearing during the crime.

In sum, it is possible that Warren may NOT have properly attributed the familiarity of the name Kevin Keith to the crime at Bucyrus Estates but rather to some prior exposure to this name.

C. The lineup and its administration. Given the poor encoding of the perpetrator by Smathers, how is it possible that she could overcome this and select Kevin Keith from the lineup? The fact that she did so did not mean that her memory somehow got better with time. Memory does not work like that. On March 18, 1994, Smathers spoke with Captain Corwin and told him that she saw Keith's picture on the television (Tr. 391). We do not know the context of why Kevin Keith was on TV, but we assume it was because he had been arrested in connection with the crime at Bucyrus Estates. If that is true, once Smathers saw his face on TV, that face could become part of Smathers' memory as a result of poor memory for the source of Keith's likeness. Seeing someone on TV does NOT help refresh someone's memory.

In sum, prior research provides an explanation for how the face Smathers saw on TV could become her selection from the lineup.

Richard Warren viewed the lineup shortly after the crime. His memory would still be relatively strong at that point. However, for reasons noted above, he appeared to remember very few details about the perpetrator. His initial descriptions described the perpetrator as a big black guy who Warren could recognize by his build and size. Despite that poor encoding, Warren picked Kevin Keith from the lineup. How did he do that? There are four possible reasons.

1) One reason could have been that Kevin Keith was the perpetrator and Richard Warren identified him. Obviously that was what the police and jury believed.

2) A second reason Warren could have selected Kevin Keith was because the lineup was biased toward

Kevin Keith. One of the children described the perpetrator as having very little hair. Kevin Keith is the only individual in the lineup without hair. An informal study was conducted to evaluate this issue. Eleven individuals with no knowledge of the crime were approached and told: "Pretend that you were robbed and all you remembered about the perpetrator was "big black guy." Who would you choose?" Obviously, these individuals have no knowledge of who committed this crime. They can only respond randomly. If the lineup was fair, their choices should have been spread among all (or at least most) of the lineup members. Instead, 8 of these 11 individuals chose #5, Kevin Keith (two chose #1 and one chose #3). To reiterate, if the lineup was fair, chance responding would result in Kevin Keith being selected about $1/6^{th}$ of the time (about twice by these 11 individuals). According to Malpass and Lindsay's (1999) measure of lineup bias, the probability of Kevin Keith being selected 8 times out of 11 if this lineup was fair was .000057 (i.e., less than 6 times out of 100,000). We have since presented the lineup to over 100 people and asked them to "choose the big black guy." Over 75% choose Kevin Keith.

In sum, Buckhout (1974) showed that an individual in a lineup is more likely to be identified when his photograph stands out and is different from the other photographs in the lineup.

3) A third reason that Kevin Keith could have been selected from the lineup was because he was familiar to Warren from some other situation. Given the connection between the Chatman family and Kevin Keith (a prior drug bust), it was possible that Warren had seen Keith around Bucyrus Estates. As we have argued throughout this report, an eyewitness (in fact,

everyone, all the time) has difficulty specifying the source that makes an event or person familiar.

In sum, Richard Warren could have selected Kevin Keith from the lineup because his face was familiar for reasons unrelated to the crime.

4) Ironically, the final reason that Warren could have selected Kevin Keith was because Warren actually had a good memory for the perpetrator. As a result, Warren eliminated the other five individuals in the lineup, whose facial features he could distinguish. But the poor quality of the photograph of Kevin Keith in position #5 made it impossible to identify who that was with any assurance. Having eliminated the other five, but being unable to carefully examine #5, why did Warren go ahead and make any selection at all? Warren's willingness to choose might have been influenced by what the police told him; the police encouraged Warren to make a choice from the lineup. On p. 22 of Warren's statement to the police, the police say: "we're going to see if you can pick him out." The implication of this statement was that the police had the perpetrator and Warren should select him, and we just argued that Kevin Keith was the only face that Warren could NOT exclude. Therefore, Kevin Keith's photo was the only one he could choose.

Instructions given prior to the lineup can affect the witness's willingness to make an identification. If instructions explicitly state or implicitly suggest that the perpetrator is in the lineup and that the witness' job is to pick that person out, the witness will be more likely to make an identification than if the witness was instructed that the perpetrator may or may not be present (Clark, 2005; Steblay, 1997). Research shows that this increase in the willingness to make an identification occurs with no increase in accuracy. Both correct and false

identification rates increase and the probative value of a suspect identification decreases.

In sum, the statement by the police encouraged Richard Warren to make a selection from the lineup.

D. Nonidentification by Quanita Reeves. One of the children who was shot, Quanita Reeves, said that Daddy's friend Bruce shot her (Tr. 715). She excluded a picture of Kevin Keith as the man she knew as Bruce (Tr. 721). Although typically ignored by the criminal justice system, disconfirming evidence has probative value regarding a suspect's innocence (Wells & Lindsay, 1980). Clark, Howell, and Davey (2008) examined a large pool of eyewitness experiments. Across these 94 experiments with lineups that contained either a guilty or an innocent suspect, the probability that the guilty suspect was chosen given that a suspect (guilty or innocent) was chosen, was .77. However, the probability that a suspect was guilty given that a nonidentification was made (i.e., everyone in the lineup was rejected, as Quanita did), was only .38.

In sum, Quanita Reeves' nonidentification provided evidence *against* Kevin Keith's guilt.

CONCLUSION

The scientific study of memory has identified risk factors that increase the likelihood of mistaken identification and undermine the probative value of identification evidence. Many of these risk factors were present in this case.

- Despite interacting with the perpetrator before the shooting, Richard Warren's description of the perpetrator was vague. Once the gun was drawn, extreme stress and weapon focus would adversely affect encoding. The perpetrator also obscured the bottom half of his face with a turtleneck. Nancy

Smathers only viewed a man fleeing the scene from a distance and encoded only the grossest characteristics about this man.

- There was some question regarding whether the police suggested the name Kevin to Richard Warren. There was no question that the police presented the name Keith to Warren. These names could have been familiar to Warren for other reasons. Also, once these names were suggested, it was difficult for Warren to keep them from becoming part of his memory.
- Smathers initially reported being unable to identify the man fleeing the crime scene and only made a lineup identification of Kevin Keith after viewing him on TV.
- The lineup was highly biased toward Kevin Keith.
- Kevin Keith could have been selected from the lineup because his face was familiar from a prior interaction between Warren and Keith.
- Warren was able to clearly see the faces of all the people in the lineup except Kevin Keith. Whatever memory of the perpetrator Warren had might have allowed him to exclude these other individuals as not looking like what he remembered. However, he could not exclude #5 (Kevin Keith) because he could not see what this person looked like. Because #5 best matched the general description (big black guy), and because the police told Warren to "...see if you can pick him out," Kevin Keith was chosen.
- Quanita Reeves indicated that although #5 resembled the perpetrator, he was not the perpetrator. Quanita Reeves' nonidentification provided evidence in favor of Kevin Keith's innocence.

In sum, based on our training and understanding of the eyewitness memory literature, the eyewitness evidence presented against Kevin Keith was very weak. Nancy Smathers' identification after viewing Kevin Keith on TV cast serious doubt on its reliability. Richard Warren's identification was tainted by many factors. Quanita Reeves nonidentification provided evidence in favor of Kevin Keith's innocence.

Respectfully submitted,

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